

THE GENERAL STATUTES OF NORTH CAROLINA

1973 CUMULATIVE SUPPLEMENT

Completely Annotated, under the Supervision of the Department
of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

Volume 2B

Discard 1971 Cumulative Supplement

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
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Preface

This Cumulative Supplement to Replacement Volume 2B contains the general laws of a permanent nature enacted at the 1965, 1966, 1967, 1969, 1971 and 1973 Sessions of the General Assembly which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D and the 1973 Supplement thereto.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1965, 1966, 1967, 1969, 1971 and 1973 Sessions of the General Assembly affecting Chapters 53 through 62 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 260 (p. 133)-283 (p. 588).
North Carolina Court of Appeals Reports volumes 1-18 (p. 351).
Federal Reporter 2nd Series volumes 317-476 (p. 656).
Federal Supplement volumes 217-356.
United States Reports volumes 373-411 (p. 525).
Supreme Court Reporter volumes 83 (p. 1560)-93 (p. 2788).
North Carolina Law Review volumes 41 (p. 665)-49 (p. 1006).
Wake Forest Intramural Law Review volumes 2-6 (p. 568).
Opinions of the Attorney General.

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VOLUME 2B

Chapter 53.

Banks.

Article 5. Stockholders.

- Sec.
53-42.1. Report of changes in ownership or management.

Article 6. Powers and Duties.

- 53-43.3. Officers and employees; share purchase and option plans.
53-43.4. Issuance of capital notes and debentures.
53-43.5. Minors' deposits and safe-deposit agreements.
53-43.6. School thrift or savings plan.
53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats.
53-45. Banks, fiduciaries, etc., authorized to invest in securities approved by the Secretary of Housing and Urban Development, Federal Housing Administration, Veterans Administration, etc.

Sec.

- 53-50. Requirement of reserve fund.
53-57, 53-58. [Repealed.]
53-70. No fees on remittances covering checks.
53-72. [Repealed.]
53-74. [Repealed.]
53-77.1. Operation of banks on five-day week basis.
53-77.2. [Repealed.]
53-77.3. Banks suspending business during an emergency.

Article 14.

Banks Acting in a Fiduciary Capacity.

- 53-159.1. Power of fiduciary or custodian to deposit securities in a clearing corporation.

Article 15.

North Carolina Consumer Finance Act.

- 53-176.1. Motor vehicle lenders.

ARTICLE 1.

Definitions.

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.

- (5) Practical Banker.—The term "practical banker" means an officer or employee of a bank actively engaged in performing duties in managing or supervising or assisting in managing or supervising the conducting of a banking business, including any such banker who is in a retired status from such duties.
- (6) Surplus.—The term "surplus" means a fund created pursuant to the provisions of this chapter by a bank from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.
- (7) Time Deposits.—The term "time deposits" means all deposits, the payment of which cannot be legally required within thirty days.

- (8) **Undivided Profits.**—The term “undivided profits” means the credit balance of the profit and loss account of any bank. (1921, c. 4, s. 1; C. S., s. 216(a); 1927, c. 47, s. 1; 1931, c. 243, s. 5; 1945, c. 743, s. 1; 1967, c. 789, s. 21.)

Editor's Note.—

The 1967 amendment inserted present subdivision (5) and redesignated former subdivisions (5), (6) and (7) as (6), (7) and (8), respectively.

As the rest of the section was not changed by the amendment, only subdivisions (5) through (8) are set out.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

ARTICLE 2.

Creation.

§ 53-2. How incorporated.

- (4) The amount of its authorized capital stock, the number of shares into which it is divided, the par value of each share; the amount of capital stock with which it will commence business, which shall not be less than one hundred thousand dollars (\$100,000.00) in cities or towns of three thousand population and under; one hundred fifty thousand dollars (\$150,000.00) in cities or towns of more than three thousand population and less than ten thousand population; two hundred thousand dollars (\$200,000.00) in cities or towns of more than ten thousand population and less than twenty-five thousand population; two hundred fifty thousand dollars (\$250,000.00) in cities or towns of more than twenty-five thousand population and less than fifty thousand population; or three hundred thousand dollars (\$300,000.00) in cities or towns of more than fifty thousand population; and in addition shall have a paid-in surplus of at least fifty percent (50%) of the authorized capital stock, as hereinbefore set out; the population to be ascertained by the last preceding national census: Provided, that this subdivision shall not apply to banks organized and doing business prior to its adoption. Provided, further, that fractional shares may be issued for the purpose of complying with the requirements of G.S. 53-88. The Banking Commission is hereby authorized and directed to adopt rules and regulations to keep such original required minimum capital funds intact to the end that they remain in and with the bank as a protection for depositors.

(1967, c. 789, s. 1.)

Editor's Note.—

The 1967 amendment added the last sentence of subdivision (4).

As the rest of the section was not changed by the amendment, only subdivision (4) is set out.

§ 53-4. Examination by Commissioner; when certification to be refused; review by Commission. — Upon receipt of a copy of the certificate of incorporation of the proposed bank, the Commissioner of Banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the Commissioner of Banks shall so certify to the Secretary of State, unless upon examination and investigation he finds that

- (1) The proposed corporation is formed for any other than legitimate banking business; or
- (2) That the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation and directors, officers, and other managerial officials are not such as to command the confidence of the community in which said bank is proposed to be located; or

- (3) That the probable volume of business and reasonable public demand in such community is not sufficient to assure and maintain the solvency of the new bank and of the then existing bank or banks in said community; or
- (4) That the name of the proposed corporation is likely to mislead the public as to its character or purpose; or
- (5) That the proposed name is the same as the one already adopted or appropriated by an existing bank in this State, or so similar thereto as to be likely to mislead the public.

Upon such certification the Secretary of State shall issue and record such certificate of incorporation.

Notwithstanding any other provisions of this section, the Commissioner of Banks shall not make the certification to the Secretary of State described above until he shall have ascertained that the establishment of such bank will meet the needs and promote the convenience of the community to be served by the bank. Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; C. S., s. 217(c); 1931, c. 243, s. 5; 1953, c. 1209, s. 1; 1963, c. 793, s. 1; 1967, c. 789, s. 2.)

Editor's Note.—

The 1967 amendment substituted "he finds" for "he has reason to believe" near the end of the opening paragraph preceding the first numbered subdivision, inserted "than" in subdivision (1), inserted "and directors, officers, and other man-

agerial officials" in subdivision (2), transferred the former last sentence of subdivision (5) to be a separate unnumbered paragraph immediately following subdivision (5) and deleted "to his satisfaction" following "ascertained" in the first sentence of the last paragraph.

§ 53-5. Certificate of incorporation, when certified.—Upon receipt of such certificate from the Commissioner of Banks, the Secretary of State shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the register of deeds of the county where the principal office of said corporation in this State shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the Commissioner of Banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State or the register of deeds of the county in which the same is recorded, or by the Commissioner of Banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the Secretary of State shall be void: Provided, however, the Commissioner of Banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; C. S., s. 217(d); 1931, c. 243, s. 5; 1967, c. 823, s. 3.)

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in two places in this section.

Sections 34 and 35, c. 823, Session Laws

1967, provide: "Sec. 34. It is the intent of this act to establish the office of the register of deeds as the filing office for all of the corporate and related documents now required to be filed with the clerk of the superior court and to transfer all of the

duties relating thereto from the clerk of the superior court to the register of deeds. To this end, all relevant sections of the General Statutes of North Carolina not specifically amended by sections 1 through 33 of this act are hereby amended to the same effect.

"Sec. 35. All of the existing records now

in the offices of the clerks of the superior court and kept pursuant to the sections of the General Statutes of North Carolina amended by this act shall be transferred from the offices of the clerks of the superior court to the offices of the registers of deeds."

§ 53-6. Payment of capital stock.

Capital Stock Required.—Domestic banks must have, by express provision of this section, capital stock. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-10. Increase of capital stock. — (a) A corporation doing business under the provisions of this chapter may increase its capital stock as provided by law for other corporations.

(b) A bank may, with the approval of the Commissioner of Banks and by the vote of the holders of at least two thirds of the stock of the particular class or classes of stock entitled to vote on such proposal, amend its charter to authorize an increase in the common stock of the bank in the category of authorized but unissued stock in an amount not to exceed ten percent (10%) of the outstanding shares of such class or classes of stock and shares so authorized shall be deemed released from preemptive rights. Such authorized but unissued stock may be issued from time to time to officers or employees of the bank pursuant to a stock option or stock purchase plan adopted in accordance with this chapter. (1921, c. 4, s. 10; C. S., s. 217 (i) ; 1965, c. 1032; 1967, c. 789, s. 3.)

Editor's Note. — The 1965 amendment The 1967 amendment designated the deleted former provisions requiring stockholders' approval. former provisions of this section as subsection (a) and added subsection (b).

§ 53-12. Consolidation of banks.—A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer shall file, or cause to be filed, with the Commissioner of Banks, certified copies of all proceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two thirds of the stock voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid, the Commissioner of Banks shall cause to be made an investigation of each bank to determine whether the interests of the depositors, creditors, and stockholders of each bank are protected, and find such consolidation is in the public interest, and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation or transfer shall be based upon such investigation. No such consolidation or transfer shall be made without the consent of the Commissioner of Banks. The expense of such investigation shall be paid by such banks. Notice of such consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the Commissioner of Banks, in a newspaper published in a city, town, or county in which each of said banks is located, and a certified copy thereof shall be filed with the Commissioner of Banks. In case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; C. S., s. 217 (k) ; 1931, c. 243, s. 5; 1967, c. 789, s. 4.)

Editor's Note.—

The 1967 amendment substituted "investigation" for "examination" in two places in the fourth sentence and in the

sixth sentence and inserted "and find such consolidation is in the public interest" in the fourth sentence.

ARTICLE 3.

*Dissolution and Liquidation.***§ 53-20. Liquidation of banks.**

(1) List of Claims Presented and Deposits; Copies; Proviso.—Upon the expiration of the time fixed for presentation of claims, the Commissioner of Banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the State Treasurer. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the Commissioner of Banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(p) Unclaimed Dividends Held in Trust.—The unclaimed dividends remaining in the hands of the Commissioner of Banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the Commissioner of Banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the Commissioner of Banks. After the Commissioner of Banks has held the unclaimed dividends held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of 10 years, he is hereby given the authority to pay the principal amount of such unclaimed dividends to the State Treasurer, to be held by the State Treasurer without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the State Treasurer, the Commissioner of Banks shall be fully discharged from all further liability therefor.

(1971, c. 1135, s. 4.)

I. GENERAL CONSIDERATION.**Editor's Note.—**

The 1971 amendment, effective July 1, 1971, substituted "State Treasurer" for "University of North Carolina" at the end

of the second sentence of subsection (1) and in two places in the next-to-last sentence and once in the last sentence of subsection (p).

As the rest of the section was not

changed by the amendment, only subsections (l) and (p) are set out. property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

For comment on escheat of intangible

ARTICLE 5.

Stockholders.

§ 53-42.1. Report of changes in ownership or management. — (a) Whenever a change occurs in the outstanding voting stock of any bank which will result in a change in the control of the bank, the president or other chief executive officer of such bank shall report such facts to the Commissioner of Banks within 24 hours after obtaining knowledge of such change in the control of the bank. As used in this section the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policy of the bank, or a change in the ownership of as much as ten percent (10%) of the outstanding voting stock in any bank.

(b) Whenever a loan or loans are made by a bank, which loan or loans are, or are to be, secured by ten percent (10%) or more of the voting stock of a bank, the president or other chief executive officer of the bank which makes the loan or loans shall report such fact to the Commissioner of Banks within 24 hours after obtaining knowledge of such loan or loans, except when the borrower has been the owner of record of the stock for a period of one year or more, or the stock is of a newly organized bank prior to its opening.

(c) The reports required in subsections (a) and (b) of this section shall contain whatever information is available to inform the Commissioner of Banks of the effect of the transaction upon control of the bank whose stock is involved and shall contain, when known by the person making the report, the number of shares involved, the identity of the sellers (or transferors) and purchasers (or transferees) of record, the identity of the beneficial owners of the shares involved, the purchase price, the total number of shares owned by the sellers (or transferors) and purchasers (or transferees) of record, both immediately prior to and after the transaction being reported, and the total number of shares owned by the beneficial owners of the shares involved, both immediately prior to and after the transaction being reported, and the identity of borrowers, the name of the bank issuing the stock securing the loan, the number of shares securing the loan and the amount of the loan or loans, and such reports shall be in addition to any reports that may be required pursuant to other provisions of law.

(d) Each bank shall report to the Commissioner of Banks within 24 hours any changes in chief executive officers or directors, including in its report a statement of the past and current business and professional affiliations of new chief executive officers or directors. (1967, c. 789, s. 5.)

ARTICLE 6.

Powers and Duties.

§ 53-43. General powers.

- (1) To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporation at the time of making loans may not take and receive interest or discounts in advance where the effective rates of interest or discounts collected shall exceed the maximum rates of

interest provided under this section, G.S. 24-1.1 and G.S. 24-1.2 if such interest or discount had not been collected in advance.

- (6) Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the State Banking Commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the State of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The Banking Commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said Commission as well as by this paragraph.

- (7) To issue, advise and confirm letters of credit authorizing the beneficiaries thereof to draw upon the institution or its correspondents.
 (8) To receive money for transmission.
 (9) To become a member of a clearinghouse association and to pledge assets required for its qualification.
 (10) To provide for the performance of bank service corporation services, such as data processing services and bookkeeping, subject to such rules and regulations as may be adopted by the State Banking Commission. (1921, c. 4, s. 26; 1923, c. 148, s. 5; C. S., s. 220(a); Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1; c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; 1955, c. 590; 1961, c. 954; 1967, c. 789, s. 6; 1969, c. 541, s. 8; c. 1303, ss. 8, 9.)

Editor's Note.—

The 1967 amendment added subdivisions (7) through (10).

The first 1969 amendment substituted "its" for "it" near the beginning of subdivision (1).

The second 1969 amendment rewrote the second sentence of subdivision (1), deleted former subdivision (6), relating to deduction of interest in advance, and renumbered former subdivisions (7) through (11) as (6) through (10). Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any

loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

As the rest of the section was not changed by the amendments, only subdivision (1) and present subdivisions (6) through (10) are set out.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

It is general banking practice to require that interest be paid in advance. The plaintiff wanted \$33,000. Had it been required to pay the interest from that sum, it would have received \$7,920 less than it sought to

borrow. By adding the interest to the principal of the note, it paid only six percent on the amount borrowed, and this would appear to be the most convenient method

of payment. Such a transaction is not tainted with usury. *Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co.*, 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 53-43.1. Obligations of agencies supervised by Farm Credit Administration as securities for deposits of public funds.—Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be without limitation, authorized securities for all deposits of public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1957, c. 507; 1973, c. 239, s. 2.)

Editor's Note.—The 1973 amendment issued by a farm credit institution pursuant inserted the provisions as to obligations to the Farm Credit Act of 1971.

§ 53-43.3. Officers and employees; share purchase and option plans.—Subject to any applicable rules or regulations of the State Banking Commission, a bank may grant options to purchase, sell or enter into agreements to sell shares of its capital stock to its officers or employees, or both, for a consideration of not less than one hundred percent (100%) of the fair market value of the shares on the date the option is granted, or, if pursuant to a stock purchase plan, eighty-five percent (85%) of the fair market value of the shares on the date the purchase price is fixed, pursuant to the terms of an officer-employee restricted stock option plan or an officer-employee stock purchase plan which has been adopted by the board of directors of the bank and approved by the holders of at least two thirds of the particular class or classes of stock entitled to vote on such proposal and by the Commissioner of Banks. In no event shall the option to purchase such shares be for a consideration less than the par value thereof. Stock options issued hereunder shall qualify as restricted stock options under the Internal Revenue Code of 1954, and corresponding provisions of subsequent United States law. (1967, c. 789, s. 7.)

§ 53-43.4. Issuance of capital notes and debentures.—A bank shall have authority to issue capital notes or debentures, convertible or otherwise, subject to such regulations as the Banking Commission may adopt with respect thereto. (1967, c. 789, s. 7.)

§ 53-43.5. Minors' deposits and safe-deposit agreements.—(a) Deposits.—A bank may operate a deposit account in the name of a minor or in the name of two or more persons, one or more of whom are minors, with the same effect upon its liability as if such minors were of full age. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(b) Dealings with Minor.—A bank may lease a safe-deposit box to and in connection therewith deal with a minor with the same effect as if leasing to and dealing with a person of full legal capacity. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(c) Safe-Deposit Agreements.—An institution may rent a safe-deposit box or other receptacle for safe deposit of property to, and receive property for safe de-

posit from, a married minor and spouse, whether adult or minor, jointly. This section shall not affect the law governing transactions with minors in cases outside the scope of this section. (1967, c. 789, s. 7.)

Stated in *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 53-43.6. School thrift or savings plan.—(a) A bank may arrange for the collection of savings from school children by the principal of the school, by the teachers, or by collectors, pursuant to regulations issued by the State Banking Commission and approved, in the case of public schools, by the board of education or board of trustees of the city or district in which the school is situated. The principal, teacher, or person authorized by the bank to make collections from the school children shall be the agent of the bank and the bank is liable to the pupil for all deposits made with such principal, teacher, or other authorized person to the same extent as if the deposits were made directly with the bank.

(b) The acceptance of deposits in furtherance of a school thrift or savings plan by an officer, employee or agent of a bank at any school shall not be construed as the establishment or operation of a branch or branch facility. (1967, c. 789, s. 7.)

§ 53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats.—(a) If the rental due on a safe-deposit box has not been paid for one year, the lessor may send a notice by registered mail to the last known address of the lessee stating that the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment of the rental is made within 30 days. If the rental is not paid within 30 days from the mailing of the notice, the box may be opened in the presence of an officer of the lessor and of a notary public who is not a director, officer, employee or stockholder of the lessor. The contents shall be sealed in a package by the notary public who shall write on the outside the name of the lessee and the date of the opening. The notary public shall execute a certificate reciting the name of the lessee, the date of the opening of the box and a list of its contents. The certificate shall be included in the package and a copy of the certificate shall be sent by registered mail to the last known address of the lessee. The package shall then be placed in the general vaults of the lessor at a rental not exceeding the rental previously charged for the box.

(b) Any documents or writings of a private nature, and having little or no apparent value need not be offered for sale, but shall be retained, unless claimed by the owner, for the period specified for unclaimed deposits, after which they may be destroyed.

(c) If the contents of the safe-deposit box have not been claimed within two years of the mailing of the certificate, the lessor may send a further notice to the last known address of the lessee stating that, unless the accumulated charges are paid within 30 days, the contents of the box will be sold at public auction at a specified time and place, or, in the case of securities listed on a stock exchange, will be sold upon the exchange on or after a specified date and that unsalable items will be destroyed. The time, place and manner of sale shall also be posted conspicuously on the premises of the lessor and advertised once in a newspaper of general circulation in the community. If the articles are not claimed, they may then be sold in accordance with the notice.

(d) The balance of the proceeds, after deducting accumulated charges, including the expense of advertising and conducting the sale, together with any money discovered in the box shall be deposited to the credit of the lessee in any account maintained by him, or if none, shall be deemed a deposit account with the bank or trust company operating the safe-deposit facility, or in the case of a subsidiary safe-deposit company, a bank or trust company owning stock therein, and shall be identified on the books of the bank as arising from the sale of contents of a safe-deposit box. When any such deposit is surrendered as unclaimed deposits, the lessor shall also send to the Commissioner a copy of the certificate and an itemized

statement of the amount received and the deductions. Any items remaining unsold may be destroyed.

(e) The deposits or proceeds from sales referred to in the preceding paragraph shall be subject to all the provisions of G.S. 116A-6, relating to the escheat of bank deposits.

(f) A copy of this section shall be printed on every contract for rental of a safe-deposit box. (1967, c. 789, s. 7.)

§ 53-44.1. Investments in obligations of agencies supervised by Farm Credit Administration.—Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be, without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This section shall be cumulative to all other laws relating to investments of such funds. (1957, c. 508; 1973, c. 239, s. 3.)

Editor's Note. — The 1973 amendment inserted the provisions as to obligations issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

§ 53-45. Banks, fiduciaries, etc., authorized to invest in securities approved by the Secretary of Housing and Urban Development, Federal Housing Administration, Veterans Administration, etc.—(a) Insured Mortgages and Obligation of National Mortgage Associations and Federal Home Loan Banks.—It shall be lawful for all commercial and industrial banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development or Federal Housing Administration, and other financial institutions engaged in business in this State, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured or guaranteed by the Federal Housing Administration, Secretary of Housing and Urban Development or the Veterans Administration, or in mortgages or deeds of trust on real estate which have been accepted for insurance or guarantee by the Federal Housing Administration, Secretary of Housing and Urban Development or Veterans Administration, and in obligations of a national mortgage association which obligations are insured or guaranteed by the United States Government, or bonds, debentures, consolidated bonds, or other obligations of any federal home loan bank or banks.

(b) Insured or Guaranteed Loans; Loans Purchased by National Mortgage Associations and Federal Home Loan Banks.—All such banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State, may make such loans, secured

by real estate, as the Secretary of Housing and Urban Development, the Federal Housing Administration, a national mortgage association, or the Veterans Administration has insured or guaranteed, or has made a commitment to insure or guarantee, and may obtain such insurance or guarantee; provided, further, that the above designated financial institutions, may make loans, secured by real estate, that are eligible and committed for sale to a national mortgage association, federal home loan bank, federal home loan mortgage corporation or other agency or instrumentality of the United States.

(c) Eligibility for Credit Insurance.—All banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration and other financial institutions, on being approved as eligible for credit insurance by the Secretary of Housing and Urban Development, the Federal Housing Administration, or the Veterans Administration, may make such loans as are insured by the Secretary of Housing and Urban Development or Federal Housing Administration or insured or guaranteed by the Veterans Administration.

(d) Certain Securities Made Eligible for Collaterals, etc.—Whenever by statute of this State, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust insured or guaranteed by the Secretary of Housing and Urban Development, Federal Housing Administration, or Veterans Administration, debentures issued by the Secretary of Housing and Urban Development or the Federal Housing Administration and obligations of a national mortgage association shall be eligible for such purposes.

(e) General Laws not Applicable.—No law of this State prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. (1935, cc. 71, 378; 1937, c. 333; 1959, c. 364, s. 1; 1961, c. 291; 1971, c. 888.)

Editor's Note.—

The 1971 amendment rewrote subsections (a) through (d).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-46. Limitations on investments in securities.—The investment in any bonds or other debt obligations of any one firm, individual, or corporation, unless it be the obligations of the United States, or agency thereof, or other obligations guaranteed by the United States Government, State of North Carolina, or other state of the United States, or of some city, town, township, county, school district, or other political subdivision of the State of North Carolina, shall at no time be more than twenty percent (20%) of the unimpaired capital and permanent surplus of any bank to an amount not in excess of two hundred and fifty thousand dollars (\$250,000.00); and not more than ten percent (10%) of the unimpaired capital and permanent surplus in excess of two hundred and fifty thousand dollars (\$250,000.00). (1921, c. 4, s. 27; C. S., s. 220(b); 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186; 1967, c. 789, s. 8.)

Editor's Note.—

The 1967 amendment substituted "debt obligations" for "interest-bearing securities" and "obligations of the United States, or agency thereof, or other obligations guaranteed by the United States Government" for "interest-bearing obligations of the United States, obligations issued

under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks, or the Home Owners' Loan Corporation" near the beginning of the section, and deleted at the end of the section a former proviso relating to certain stocks or bonds lawfully acquired prior to February 25, 1927.

§ 53-47. Stocks, limitations on investment in.—No bank shall make any investment in the capital stock of any other state or national bank: Provided, that nothing herein shall be construed to prevent banks doing business under this Chapter from subscribing to or purchasing, upon such terms as may be agreed upon, the capital stock of clearing corporations as defined in G.S. 25-8-102(3), the capital stock of banks organized under that act of Congress known as the "Edge Act" or the capital stock of central reserve banks whose capital stock exceeds one million dollars (\$1,000,000). To constitute a central reserve bank as contemplated by this Chapter, at least fifty percent (50%) of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of Congress commonly known as the "Edge Act," shall at no time exceed ten percent (10%) of the paid-in capital and permanent surplus of the bank making same. No bank shall invest more than fifty percent (50%) of its permanent surplus in the stocks of other corporations, firms, partnerships, or companies, unless such stock is purchased to protect the bank from loss. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the Commissioner of Banks if in his judgment it is for the best interest of the bank that such extension be granted; provided that the limitations imposed in this section on the ownership of stock in or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the Commissioner of Banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; C. S., s. 220(c); 1931, c. 243, s. 5; 1935, c. 81, s. 3; 1973, c. 497, s. 7.)

Editor's Note.—

ing corporations as defined in G.S. 25-8-

The 1973 amendment inserted, in the 102(3)."
first sentence, "the capital stock of clear-

§ 53-48. Loans, limitations of.—The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty percent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten percent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the bank: Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, the making of any loans, secured by not less than a like face amount of bonds of the United States, or an agency of the United States, or other obligations guaranteed by the United States Government, or State of North Carolina or certificates of indebtedness of the United States, or agency thereof, or other obligations guaranteed by the United States Government, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States,

including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; C. S., s. 220(d); 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; 1945, c. 127, s. 1; 1967, c. 789, s. 9.)

Editor's Note.—

The 1967 amendment inserted "or an agency of the United States, or other obligations guaranteed by the United

States Government" and "or agency thereof, or other obligations guaranteed by the United States Government" in the first proviso.

§ 53-50. Requirement of reserve fund.—(a) A bank which is not a member of the Federal Reserve System shall maintain at all times a reserve fund in such percentages as shall be fixed by regulation of the Banking Commission, which percentages shall be equal to or less than by not more than two percentage points, but never greater than, those required under the laws of the United States for banks which are members of the Federal Reserve System. The amount of the required reserve for each day shall be computed on the basis of average daily deposits covering such biweekly or shorter periods as shall be fixed by regulation of the Banking Commission.

(b) A bank which is a member of the Federal Reserve System shall maintain at all times a reserve fund in accordance with the requirements applicable to a member bank under the laws of the United States.

(c) A bank shall give written notice to the Commissioner of Banks, in the manner prescribed by the Commissioner for such notice, of any deficiency in the reserve fund required under subsection (a) or (b) of this section within three business days after the close of any scheduled averaging period during which such deficiency occurs. (1921, c. 4, s. 31; C. S., s. 220(f); 1967, c. 789, s. 10; 1973, c. 554.)

Editor's Note.—The 1967 amendment rewrote this section.

The 1973 amendment rewrote subsection (a).

§ 53-52. Forged check, payment of.

Cross Reference.—As to bank customer's duty to discover and report unauthorized signature or alteration under Uniform Commercial Code, see § 25-4-406.

Receipt of Statement by Agent Who Is Forger Is Receipt by Depositor. — The mailing of a bank statement, with cancelled checks, and the acceptance thereof from the post office by the depositor in person or through his authorized agent, constitutes a receipt by the depositor of such documents within the meaning of this section, and the depositor's failure to give the required notice to the bank, within the specified time thereafter, bars his right of recovery even though the "authorized agent" so receiving the bank statement, is the forger and, again, is unfaithful to his trust by concealing the voucher from the depositor. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

But Rule Does Not Apply Where Account Is Unauthorized and Unknown.—See *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

There is no duty upon the depositor to examine endorsements upon his genuine checks. *Nationwide Homes of Raleigh,*

N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Section Is Inapplicable If Checks Are Not Forgeries or Notice Is Given. — If checks drawn by an agent of the depositor are not forgeries, this section has no application; if the checks are forgeries, the defense of the statute is not available to the bank when the depositor gives notice to the bank within the time provided by the statute. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966) (not deciding whether check signed in name of depositor by one claiming to be agent, but without authority to sign, is a forgery).

Only those checks returned more than sixty days prior to the protest are proper credits under this section. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 262 N.C. 79, 136 S.E.2d 202 (1964).

This section does not require notice in any specified form. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

Sufficiency of Notice.—It is sufficient that within the time allowed by this section the depositor gives to the bank notice

sufficient in content to advise the bank that the debits charged to the depositor's account are based upon checks which are "forged." *Nationwide Homes of Raleigh, N.C. Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

Notice to the bank that the entire account is unauthorized and unknown to the person in whose name it is opened necessarily advises the bank that any check charged thereto, which check purports to be drawn in the name of such account holder, was drawn without authority and with fraudulent intent—a forgery within the contemplation of a stipulation that checks drawn on the account were forgeries and not checks or drafts of the plaintiff. *Nationwide Homes of Raleigh, N.C., Inc.*

v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

The burden, etc.—

The burden is on the bank seeking the protection afforded by this section to show delivery of the voucher to the depositor more than sixty days before the claim is made. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

The burden is on a bank, in order to avail itself of the provisions of this section, to show when the checks were returned to the depositor. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 262 N.C. 79, 136 S.E.2d 202 (1964).

§ 53-53. Minor, payment of deposit in the name of.

Cited in *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E.2d 19 (1970).

§§ 53-57, 53-58: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Cross Reference. For provisions of the Uniform Commercial Code as to bank deposits and collections, see §§ 25-4-101 to 25-4-504.

§ 53-60. Farm loan bonds, authorized investment in.—Any bank or insurance company organized under the laws of this State, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or jointstock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, 1916, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. (1921, c. 4, s. 41; C. S., s. 220(p); 1973, c. 239, s. 4.)

Editor's Note. — The 1973 amendment issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

§ 53-62. Establishment of branches or tellers' windows.

(b) Any bank doing business under this chapter may establish branches or teller's windows in the cities or towns in which they are located, or elsewhere, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.

(c) Such branch banks shall be operated as branches of and under the name of

the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier or such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the Commissioner of Banks shall not authorize the establishment of any branch or teller's window, the capital of whose parent bank is not sufficient in an amount to provide for the capital of at least one hundred thousand dollars (\$100,000.00) for the parent bank, and a capital of at least one hundred thousand dollars (\$100,000.00) for each branch or teller's window which it is proposed to establish in cities or towns of three thousand population or less; at least one hundred fifty thousand dollars (\$150,000.00) in cities or towns whose population exceeds three thousand, but does not exceed ten thousand; at least two hundred thousand dollars (\$200,000.00) in cities or towns whose population exceeds ten thousand, but does not exceed twenty-five thousand; at least two hundred fifty thousand dollars (\$250,000.00) in cities or towns whose population exceeds twenty-five thousand, but does not exceed fifty thousand; at least three hundred thousand dollars (\$300,000.00) in cities or towns whose population exceeds fifty thousand. The provisions of this subsection shall not be retroactive with respect to branches or teller's windows established or approved by the State Banking Commission prior to June 11, 1963. If a bank which hereafter proposes to establish a branch or teller's window is deficient in capital stock as measured by the above set-forth formula, it shall not be necessary for such bank to provide or allocate additional capital for branches or teller's windows established or approved by the State Banking Commission prior to June 11, 1963, until such a time as such bank makes application for an additional branch or teller's window. At that time sufficient capital and surplus must be allocated to bring the parent bank and all branches and teller's windows into compliance with the above requirements. The bank may, at its option, allocate capital stock and unimpaired surplus, or either, to its branches and teller's windows and may determine the proportion of each, or may allocate all capital stock or all unimpaired surplus. In applying this section, population shall be ascertained by the last preceding national census; provided, however, with respect to any branch or teller's windows established or approved by the State Banking Commission before June 11, 1963, population shall be ascertained by the last national census preceding the establishment of such branch.

(e) A bank may discontinue a branch office or teller's window upon resolution of its board of directors or board of managers. Upon the adoption of such a resolution, the bank shall file a certification with the Commissioner of Banks specifying the location of the branch office or teller's window to be discontinued and the date upon which it is proposed that the discontinuance shall be effective. This certificate must state the reasons for the closing of such branch or teller's window and indicate that the needs and conveniences of the community would still be adequately met. Notice stating the intention to discontinue said branch or teller's window shall be published in a newspaper serving such community once a week for four consecutive weeks before any certificate requesting discontinuance is filed with the Commissioner of Banks. No such branch or teller's window may be discontinued until approved by the Commissioner of Banks, who shall first hold a public hearing thereon, if so requested by any interested party.

(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C. S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; 1953, c. 1209, ss. 2, 5; 1963, c. 793, s. 3; 1967, c. 789, s. 11.)

Editor's Note.—

The 1967 amendment substituted "he shall find" for "he shall have ascertained to his satisfaction" near the beginning

of the last sentence of subsection (b), substituted "or" for "and" following the word "cashier" near the beginning of the second sentence of subsection (c), inserted present subsection (e), and redesignated former subsection (e) as subsection (f).

As subsections (a) and (d) were not changed by the amendment, they are not set out.

Section construed and applied in First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969).

Purpose of Section.—The motivation for this section was to minimize the danger of a run on a bank due to a rumor of insolvency. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose of subsection (b) of this section was to require that each separate branch contribute to the solvency of the system. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose to be accomplished by subsection (b)'s rules was to protect the solvency of banks. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

There is no conflict between the policies of the federal antitrust statutes and the "need and convenience" test for the establishment of a branch bank. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 448 F.2d 637 (4th Cir. 1971).

"Need and Convenience." — Neither the North Carolina statute nor any decided cases provides any degree of specificity as to the factors, proof of which would show the presence or absence of "need and convenience" for a new branch bank. *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969).

This section does not provide any degree of specificity as to the factors, proof of which would show the presence or absence of "need and convenience" for a new branch bank. *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972).

Determination of whether a proposed branch bank will meet the needs and promote the convenience of the community to be served should involve a consideration of at least the following factors: (1) whether existing banks provide a full complement of banking services at competitive rates and fees; (2) the need for specialized services offered by the applicant bank not presently available through existing banks, examples of such services

being: a. larger lending limits, b. trust department services, c. consumer and commercial loan expertise, d. international banking, e. farm development services, f. industrial development services, g. automated accounting and check clearance services; (3) the extent to which management of existing banks has been active and vigorous as evidenced by the assumption of leadership and participation in the economic growth of the community; (4) the composition of the population and its prospects for growth; (5) the nature and strength of the economy and its prospects for growth; (6) the extent to which competition from the entry of a new bank in the area will stimulate the economy and make for a more healthy banking business; and (7) the extent to which the entry of the new bank has public support in the community. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Quantum of proof to show need and convenience for the establishment of a branch office in a suburban area would be much less than that required to show need and convenience for the establishment of an entirely new banking facility in the city. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

The fact that applicant is the largest bank in North Carolina is irrelevant, alone, in determining needs and convenience. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Is an Administrative Question. — With respect to banking, what will serve the needs of the community is, to a substantial degree, an administrative question involving a multiplicity of factors which cannot be given inflexible consideration. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9 (1972); *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972).

But Banking Commission Does Not Have Untrammelled Discretion. — The Banking Commission does not have untrammelled discretion in determining what "will meet the needs and promote the convenience" of the community. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

What Commission Must Find. — As a condition precedent to the establishment of a branch, the Commissioner of Banks must find that such branch will meet the needs of the community and the probable

volume of business will be sufficient to assure and maintain the solvency of such branch. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The solvency tests under subsection (b) of this section are twofold: Each new branch must not endanger the solvency of the parent bank and it must not endanger the solvency of another bank already in the field. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

A branch may not be established which would be a financial failure or would endanger the solvency of another bank already in the field. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

Applicant Need Not Establish Existence of Specific Unmet Banking Need.—Subsection (b) of this section does not require that an applicant bank establish the existence of specific, unmet banking needs as a prerequisite to the establishment of a branch bank. *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972).

Subsection (b) of this section does not require an applicant for a branch bank to establish the existence of a specific unmet banking need which existing banks are unable or unwilling to provide as a prerequisite to the establishment of a new facility. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

But Merely Offering to Provide Alternative Banking Services Is Not Sufficient.—Absent some indication that additional competition is desirable, merely offering to provide alternative banking services is not sufficient under the statute. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

Test of Substantial Evidence Not Met.—Where the evidence is uncontradicted that the existing banks offer a full complement of banking services at competitive rates, that the only specialized services offered by the applicant which are not offered by the existing banks are larger lending limits and international banking for which the likelihood of any need now or in the future has not been shown, and that there is no indication the proposed branch has public support in the community, the decision that a new bank is necessary does not meet the test of substantial evidence. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

No provision is made for the approval of any branch that fails to meet the requirements of subsection (b)(i) and (ii). *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

Consolidation of Applications for Hearing.—Applications for branches may be consolidated and heard together, but the evidence and finding must be sufficient to support each application independent of the other. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The fact that the Commission consolidated two applications for hearing, and made findings and conclusions applicable to both, does not of itself invalidate an order approving the applications. *State ex rel. Banking Comm'n v. Lexington State Bank*, 12 N.C. App. 232, 182 S.E.2d 854 (1971).

While two applications by a bank to establish branches in the same city may be consolidated for hearing, each application must be treated as a separate application and be approved or denied on the basis of the evidence relating thereto, and separate findings and conclusions must be made as to each application. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

National branch banking is limited to states the laws of which permit it, and even there only to the extent that the state laws permit branch banking. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 325 F. Supp. 523 (M.D.N.C. 1971), *aff'd*, 448 F.2d 637 (4th Cir. 1971).

Approval of Branch National Bank.—All statutory law requirements of the State dealing with the establishment of branch State banks must be complied with before a branch national bank can be lawfully approved by the Comptroller of the Currency of the United States. *First Citizens Bank & Trust Co. v. Camp*, 281 F. Supp. 786 (E.D.N.C. 1968).

The Comptroller of the Currency of the United States is bound by State law in considering the applications of national banks to establish branch banks. *Citizens Nat'l Bank v. Wachovia Bank & Trust Co.*, 329 F. Supp. 585 (M.D.N.C. 1971).

The Comptroller of the Currency of the United States is bound by North Carolina's "need and convenience" and "solvency of the branch" criteria as set forth in subsection (b) of this section. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 448 F.2d 637 (4th Cir. 1971).

The Comptroller of the Currency in au-

thorizing branch offices of national banks in North Carolina is bound by the "need and convenience" and "solvency of the branch" criteria of subsection (b) of this section. *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972).

The Comptroller of the Currency of the United States is bound to consider the North Carolina "need and convenience" test for the establishment of a branch bank. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 448 F.2d 637 (4th Cir. 1971).

Where the Comptroller of the Currency of the United States has made, even though belated and grudgingly, legally sufficient findings and conclusions on the criteria prescribed by this section, and such findings are supported by substantial evidence, his action would be neither arbitrary nor capricious and must be approved. *Citizens Nat'l Bank v. Wachovia Bank & Trust Co.*, 329 F. Supp. 585 (M.D.N.C. 1971).

Where a careful reading of the entire opinion of the Comptroller of the Currency of the United States left the court with the impression that he had in fact taken into account the factors required to be considered by this section, the court held

that his findings sufficed to satisfy the requirements of this section, notwithstanding his avowed intention not to do so. *First Citizens Bank & Trust Co. v. Southern Nat'l Bank*, 329 F. Supp. 186 (E.D.N.C. 1971).

To show that the needs of a community will be met by a proposed branch bank does not require evidence from potential bank customers of their individual needs which existing banks are unwilling or unable to provide; rather, the Comptroller of the Currency of the United States is free to apply the expertise of his office to determine if the proposed branch will meet the needs and promote the convenience of the community to be served, and if his decision is supported by substantial evidence it will be sustained. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Applied in *First-Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481 (4th Cir. 1970); *State ex rel. Banking Comm'n v. Bank of Rocky Mount*, 12 N.C. App. 112, 182 S.E.2d 625 (1971); *State ex rel. Banking Comm'n v. Lucama-Kenly Bank*, 17 N.C. App. 557, 195 S.E.2d 69 (1973).

§ 53-67. Boards of directors, banks controlled by. — The corporate powers, business, and property of banks doing business under this chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held at such time as may be designated by the charter or the bylaws of the bank but shall be held not later than the thirty-first day of March in each year. In addition to the foregoing powers relating to the fixing of the number and the election of directors, the stockholders of a bank, at any stockholders' meeting, special or annual, may authorize not more than two additional directorships which may be left unfilled and to be filled in the discretion of the directors of the institution during the interval between such stockholders' meetings. (1921, c. 4, s. 48; C. S., s. 220(w); 1925, c. 170; 1965, c. 188; 1967, c. 789, s. 12.)

Editor's Note.—

The 1965 amendment substituted the present third sentence for one providing for holding the annual meeting during the month of January.

The 1967 amendment added the last sentence.

§ 53-70. No fees on remittances covering checks.—No bank or trust company in this State shall charge a fee on remittances covering checks. (1921, c. 20, s. 1; C. S., s. 220(z); 1971, c. 244, s. 1.)

Editor's Note. — The 1971 amendment, effective Dec. 31, 1972, rewrote this section.

§ 53-72: Repealed by Session Laws 1971, c. 244, s. 3, effective December 31, 1972.

§ 53-73. Checks exempted.—All checks drawn on the banks and trust companies in this State in payment of obligations due the State of North Carolina or the federal government shall be exempt from the provisions of G.S. 53-71. (1921 c. 20, s. 4; C. S., s. 220(cc); 1971, c. 244, s. 2.)

Editor's Note. — The 1971 amendment substituted "G.S. 53-71" for "§§ 53-70 and 53-71."

§ 53-74: Repealed by Session Laws 1971, c. 244, s. 3, effective December 31, 1972.

§ 53-77.1. Operation of banks on five-day week basis.—(a) Any bank as defined by G.S. 53-1 or G.S. 53-136, including national banking associations and federal reserve banks, or any branch or office of any of the foregoing, located in this State, may operate on a five-day week basis upon receiving the written permission of the Commissioner of Banks to do so. Such permission shall not be granted until after 10 days' notice published in a newspaper of general circulation in the community where the bank is located, and unless the Commissioner shall find that the best interests of the public and the bank will be served by a five-day week. The Commissioner of Banks may within his discretion hold a hearing in the community where the bank is located to determine whether the bank should be permitted to operate on a five-day week basis.

(b) The request of a bank desiring permission so to operate shall specify which day of the week it shall be closed and the notice published shall also specify the day of the week upon which the bank shall be closed.

(c) At the hearing the Commissioner shall hear all evidence offered and if he shall find that the best interests of the bank and the public will be served by a five-day week, he shall enter an order directing that the bank shall be closed upon the day of the week specified in the original request.

(d) A bank operating on a five-day week under the provisions of this Article shall comply with the following provisions:

(1) On one day of the week such bank shall remain open for not less than seven hours, three of which shall be after 3:00 P.M.

(2) The bank shall remain open on each of the following State holidays: Lee-Jackson Day, Halifax Day, Confederate Memorial Day, Mecklenburg Declaration of Independence Day, Memorial Day and Election Day, unless such holiday falls on the day on which said bank is otherwise closed under the provisions of this section.

(e) Any day on which a bank or branch or office thereof shall remain closed as herein permitted, shall, as to such closed bank or branch or office constitute a legal holiday, and any act authorized, required, or permitted to be performed at, by or with respect to any such bank or branch or office on a day when it is closed may be performed on the next succeeding business day and no liability or loss of rights of any kind shall result from such delay.

(f) After a five-day week basis has been ordered pursuant to this section with respect to any bank, the above procedure shall be applicable with respect to any subsequent request to revert to a six-day week basis, and such reversion may be ordered by the Commissioner if he shall find that the best interest of the bank and the public will be served by a six-day week.

(g) Every bank in the State shall continue to observe the same days of closing as are observed by the bank on May 6, 1971 until a change is authorized pursuant to this section. (1953, c. 965; 1955, cc. 546, 1220; 1957, c. 350, s. 1; c. 687; 1959, c. 156; 1971, c. 319, s. 1.)

Local Modification.—Craven: 1971, c. 34.

Editor's Note.—

The 1971 amendment rewrote this sec-

tion, which formerly related to Saturday closing of banks in cities and towns of certain specified populations.

§ 53-77.2: Repealed by Session Laws 1971, c. 319, s. 2.

Cross Reference. — For present provisions as to operation of banks on a five-day week basis, see § 53-77.1.

§ 53-77.3. Banks suspending business during an emergency.—(a) As used in this section, unless the context otherwise requires:

- (1) "Bank" includes commercial banks, industrial banks, savings banks, trust companies, any branch or agency of a foreign banking organization, any person or association of persons lawfully carrying on the business of banking, whether incorporated or not, and, to the extent that the provisions hereof are not inconsistent with and do not infringe upon paramount federal law, also includes national banks.
- (2) "Emergency" means any condition or occurrence, which may interfere physically with the conduct of normal business operations at one or more or all of the offices of a bank, or which poses an imminent or existing threat to the safety or security of persons or property, or both. Without limiting the generality of the foregoing, an emergency may arise as a result of any one or more of the following: fire; flood; earthquake; hurricanes; wind, rain, or snow storms; labor disputes and strikes; power failures; transportation failures; interruption of communication facilities; shortages of fuel, housing, food, transportation or labor; robbery or attempted robbery; actual or threatened enemy attack; epidemics or other catastrophes; riots, civil commotions, and other acts of lawlessness or violence, actual or threatened.
- (3) "Office" means any place at which a bank transacts its business or conducts operations related to its business.
- (4) "Officers" means the person or persons designated by the board of directors, board of trustees, or other governing body of a bank, to act for the bank in carrying out the provisions of this section or, in the absence of any such designation or of the officer or officers so designated, the president or any other officer currently in charge of the bank or of the office or offices in question.

(b) Whenever the Commissioner of Banks is of the opinion that an emergency exists, or is impending, in this State or in any part or parts of this State, he may authorize banks located in the affected area or areas to close any or all of their offices. In addition, if the Commissioner is of the opinion that an emergency exists, or is impending, which affects, or may affect, a particular bank or banks, or a particular office or offices thereof, but not banks located in the area generally, he may authorize the particular bank or banks, or office or offices so affected, to close. The office or offices so closed shall remain closed until the Commissioner declares that the emergency has ended, or until such earlier time as the officers of the bank determine that one or more offices, theretofore closed because of the emergency, should reopen, and, in either event, for such further time thereafter as may reasonably be required to reopen.

In the event communications systems should be so disrupted as to make it impossible or impractical for a bank official to communicate with the Commissioner of Banks, the bank officer or manager or other person in charge of any such bank or branch bank may close said office without prior approval of the Commissioner of Banks provided he gives prompt notice thereof to the Commissioner as soon as communications have been restored.

(c) Any day on which a bank, or any one or more of its offices, is closed during all or any part of its normal banking hours pursuant to the authorization granted under this section shall be, with respect to such bank or, if not all of its offices are closed, then with respect to any office or offices which are closed, a legal holiday for all purposes with respect to any banking business of any char-

acter. No liability, or loss of rights of any kind, on the part of any bank, or director, officer, or employee thereof, shall accrue or result by virtue of any closing authorized by this section.

(d) The provisions of this section shall be construed and applied as being in addition to, and not in substitution for or limitation of, any other law of this State or of the United States authorizing the closing of a bank or excusing the delay by a bank in the performance of its duties and obligations because of emergencies or conditions beyond the bank's control, or otherwise. (1971, c. 465.)

ARTICLE 7.

Officers and Directors.

§ 53-84. Depositories, designated by directors.—By resolution of the board of directors, other banks organized under the laws of this State, or of another state, or of the National Banking Act of the United States, shall be designated as depositories or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the Commissioner of Banks and the depository so designated shall be subject to the approval of the Commissioner of Banks. For causes which he may deem adequate, the Commissioner of Banks shall have authority at any time to withdraw such approval.

A bank may deposit funds in a bank of a foreign country, but such deposits shall not constitute any part of its reserve as defined in G.S. 53-51. (1921, c. 4, s. 55; C. S., s. 221(g); 1931, c. 243, s. 5; 1967, c. 789, s. 14.)

Editor's Note.—

The 1967 amendment added the second paragraph.

§ 53-85. Stockholders' book.

Cited in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-86. Directors, officers, etc., accepting fees, etc.—No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this Chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this Chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper fees to any licensed attorney or licensed real estate broker or salesman, who is a director but not an officer or employee of the bank for professional services rendered, and nothing in this section shall be construed to apply to commissions on insurance and surety bond premiums. (1921, c. 4, s. 57; C. S., s. 221(i); 1947, c. 695; 1971, c. 272.)

Editor's Note.—

The 1971 amendment deleted "attorney's" preceding "fees" in the last sentence and inserted "or licensed real estate broker or

salesman, who is a director but not an officer or employee of the bank" in that sentence.

§ 53-91. Officers and employees may borrow, when.—No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount

of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness: Provided, however, this section shall not apply to directors who are neither officers nor employees of the bank; provided, further, that it shall not be necessary to require collateral or other security with respect to loans, the total of which to an individual borrower, does not exceed twenty-five hundred dollars (\$2500.00) made pursuant to this section; provided, further, that in no event shall a loan in excess of forty-five thousand dollars (\$45,000.00) be made by any bank to any officer of such bank. (1921, c. 4, s. 62; C. S., s. 221(n); 1925, c. 119, s. 2; 1927, c. 47, s. 12; 1967, c. 789, s. 15; 1969, c. 41.)

Editor's Note.—

The 1967 amendment added the second and third provisos.

The 1969 amendment substituted "forty-

five thousand dollars (\$45,000.00)" for "twenty-five hundred dollars (\$2500.00)" in the third proviso.

ARTICLE 8.

Commissioner of Banks and Banking Department.

§ 53-92. Appointment of Commissioner of Banks; State Banking Commission.—On or before April first, one thousand nine hundred and thirty-one, after the ratification of this section, and quadrennially thereafter, the Governor, with the advice and consent of the Senate, shall appoint a Commissioner of Banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal. The Commissioner of Banks shall, before entering upon the discharge of his duties, enter into bond with some surety company authorized to do business in the State of North Carolina, in the sum of not less than fifty thousand dollars, conditioned upon the faithful and honest discharge of all duties and obligations imposed by statute upon him. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8.

The State Banking Commission, which has heretofore been created, shall hereafter consist of the State Treasurer, who shall serve as an ex officio member thereof, and twelve members who shall be appointed by the Governor. Not more than five members of the said Commission shall be practical bankers, and the remainder of the membership of the said Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. At least two members shall be selected primarily as representative of the borrowing public, and they shall have no interest in any regulated financial institution other than as a depositor or borrower and shall not be primarily engaged in any business involving retail credit sales. The terms of office of the two additional members who are now to be appointed shall expire on the first day of April, 1957, and thereafter their successors shall be appointed by the Governor for terms of four years each and shall serve until their successors are appointed and qualified. One member shall be appointed for a four (4) year term commencing April 1, 1961, and his successor shall be appointed quadrennially thereafter. Successors to members whose terms expired on the first of April, 1953, shall be filled by the Governor for the unexpired portion of the four-year terms which began on said date. Members of the Commission whose present terms expire on the first day of April, 1955, shall continue in office until the expiration of their respective terms and until their successors are appointed and qualified. The two members appointed pursuant to the action of the 1969 General Assembly shall serve until April 1, 1973, and their successors shall serve for four-year terms as is hereinafter provided for other members of the Commission. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the Governor for terms of four years each. Any vacancy occurring in

the membership of the Commission shall be filled by the Governor for the unexpired term. The appointive members of said Commission shall be filled by the Governor for the unexpired term. The appointive members of said Commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission, which compensation shall be paid from the fees collected from the examination of banks as provided by law.

The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any State banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State; any party to a proceeding before the Banking Commission may, within twenty days after final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved. The cause shall be entitled "State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)." It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In the event of an appeal the Commissioner shall certify the record to the clerk of Superior Court of Wake County within fifteen days thereafter. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372; 1953, c. 1209, ss. 4, 6; 1961, c. 547, s. 2; 1967, c. 789, s. 16; 1969, c. 844, s. 6; c. 920.)

Editor's Note.—

The 1967 amendment rewrote the second sentence of the second paragraph. Section 16, Session Laws 1967, c. 789, provides: "The amendment contained in this section shall not apply to members currently serving under appointments made prior to the effective date of this act, but shall apply to their successors only." The amendatory act was ratified June 15, 1967, and made effective on ratification.

The first 1969 amendment added the last sentence of the first paragraph.

The second 1969 amendment, effective July 1, 1969, substituted "twelve" for "ten (10)" in the first sentence of the second paragraph and added the present third and eighth sentences of the second paragraph.

State Government Reorganization.—The State Banking Commission and Commissioner of Banks were transferred to the Department of Commerce by § 143A-177, enacted by Session Laws 1971, c. 864.

Quoted in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-104. Commissioner of Banks shall have supervision over, etc.

Cited in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

ARTICLE 9.

Bank Examiners.

§ 53-117. Appointment by Commissioner of Banks. — The Commissioner of Banks, for the purpose of carrying out the provisions of this chapter, shall appoint from time to time such State bank examiners, assistant State bank examiners, clerks and stenographers as may be necessary to make a thorough examination of and into the affairs of every bank doing business under this chapter, as often as the Commissioner of Banks may deem necessary, and at least once each year, provided the Commissioner of Banks may extend this period to 15 months when, in his opinion, an emergency condition exists that necessitates such action. The Commissioner of Banks may at any time remove any person appointed by him under this chapter. (1921, c. 4, s. 72; C. S., s. 223(a); 1931, c. 243, s. 5; 1967, c. 789, s. 17.)

Editor's Note.—

The 1967 amendment added the proviso at the end of the first sentence.

§ 53-122. Fees for examinations and other services.

- (6) In the first half of each calendar year, the State Banking Commission shall review the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees provided for under subdivisions (1) and (2) shall exceed the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may reduce by uniform percentage the fees provided for in subdivisions (1) and (2) of this section but not in a percentage greater than fifty percent (50%) nor to an amount which will reduce the amount of the fees to be collected below the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees provided for under subdivisions (1) and (2) shall be less than the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may increase by uniform percentage the fees provided for in subdivisions (1) and (2) of this section to an amount which will increase the amount of the fees to be collected to an amount at least equal to the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. Such fees shall be reduced whenever a surplus exists which exceeds the estimated cost of operating the office of the Commissioner of Banks for one year, even if such reduction shall result in the collection of a smaller sum than the estimated cost of maintaining the office of the Commissioner of Banks for that year. In no event shall any surplus at the end of any fiscal year resulting from the collection of fees pursuant to this section revert to the general fund. (1921, c. 4, s. 77; C. S., s. 223(f); 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; 1945, c. 467; 1955, c. 640, ss. 1, 2; 1957, c. 1443, s. 1; 1969, c. 229.)

Editor's Note.—

The 1969 amendment rewrote subdivision (6).

As only subdivision (6) was changed by

the amendment, the rest of the section is not set out.

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 10.

*Penalties.***§ 53-135. General corporation law to apply.**

Quoted in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

ARTICLE 11.

Industrial Banks.

§ 53-139. **Capital stock.**—The amount of capital stock with which any industrial bank shall commence business shall not be less than fifty percent (50%) of that which would be required of a commercial bank under the provisions of G.S. 53-2. (1923, c. 225, s. 4; C. S., s. 225(d); 1967, c. 789, s. 18.)

Editor's Note.—The 1967 amendment rewrote this section.

§ 53-141. **Powers.**—Industrial banks shall have the powers conferred by paragraphs 1, 2, 3, 5 and 7 of § 55-17, and subdivision (3) of § 53-43, such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

- (1) To discount and negotiate promissory notes, drafts, bills of exchange and other evidences of indebtedness, and to loan money on real or personal security, and to purchase notes, bills of exchange, acceptances or other choses in action, and to take and receive interest or discounts subject to G.S. 53-43 (1).
- (2) To make loans and charge and receive interest at rates not exceeding the rates of interest provided in G.S. 24-1.1 and 24-1.2.
- (3) To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the State, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find
 - a. That the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and
 - b. That the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.

Provided, that the Commissioner of Banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for capital in an amount equal to that required with respect to the establishment of branches of commercial banks under the provisions of G.S. 53-62. For the purposes of this paragraph, the provisions of G.S. 53-62 as to the meaning of the word "capital" shall be applicable.

A bank may discontinue a branch office upon resolution of its board of directors or board of managers. Upon the adoption of such a resolution, the bank shall file a certification with the Commissioner of Banks specifying the location of the branch office to be discontinued and the date upon which it is proposed that the discontinuance shall be effective. This certificate must state the reasons for the closing of such branch and indicate that the needs and convenience of the community would still be adequately met. Notice stating the intention to discontinue the said branch shall be published in a newspaper serving said community once a week for four consecutive weeks before a certificate

requesting a discontinuance is filed with the Commissioner of Banks. No such branch may be discontinued until approved by the Commissioner of Banks, who shall first hold a public hearing thereon, if so requested by any interested party.

- (4) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contract, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations.
- (5) To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.
- (6) Subject to the approval of the State Banking Commission, to solicit, receive and accept money or its equivalent on deposit subject to check; provided, however, no such approval shall be given unless and until such industrial bank meets the capital requirements of a commercial bank as set forth in G.S. 53-2. (1923, c. 225, s. 6; C. S., s. 225(f); 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; 1945, c. 283; 1949, c. 952, ss. 1, 2; 1959, c. 365; 1967, c. 789, s. 19; 1969, c. 1303, ss. 10-12.)

Editor's Note.—

The 1967 amendment rewrote present subdivision (3) and added the proviso to present subdivision (6).

The 1969 amendment rewrote subdivision (1), deleted former subdivision (2), relating to deduction of interest in advance, renumbered former subdivisions (3) through (7) as (2) through (6) and rewrote present

subdivision (2). Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

ARTICLE 12.

Joint Deposits.

§ 53-146. Deposits in two names.

Editor's Note.—

For note on joint bank accounts with

the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

ARTICLE 14.

Banks Acting in a Fiduciary Capacity.

§ 53-159.1. Power of fiduciary or custodian to deposit securities in a clearing corporation.—Notwithstanding any other provision of law, any fidu-

ciary holding securities in its fiduciary capacity, any bank or trust company holding securities in a fiduciary capacity or as a custodian or agent is authorized to deposit or arrange for the deposit of such securities in a clearing corporation as defined in G.S. 25-8-102(3). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank or trust company acting as a fiduciary or as a custodian or managing agent shall at all times show the name of the party for whose account the securities are so deposited. Title to such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank or trust company so depositing securities pursuant to this section shall be subject to such rules and regulations as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue. A bank or trust company acting as custodian or agent for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary. This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a fiduciary or as a custodian or managing agent acting on May 15, 1973 or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian or agent owns capital stock of such clearing corporation. The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such securities so deposited. (1973, c. 497, s. 4.)

§ 53-160. License to do business. — Before any such bank is authorized to act in any fiduciary capacity without bond, it must be licensed by the Commissioner of Banks of the State. For such license the licensee shall pay to the State Banking Commission an annual license fee of two hundred dollars (\$200.00), which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity, insofar as it may be necessary, and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State: Provided, however, that a national bank which has been granted trust powers by the Comptroller of the Currency or his duly authorized agent shall be annually licensed as required in this section and shall be granted a certificate of solvency which will meet the provisions of § 53-162 without examination by the Commissioner of Banks as required in § 53-161. (1945, c. 743, s. 1; 1967, c. 789, s. 20.)

Editor's Note.—The 1967 amendment added the proviso at the end of the section.

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-164. Title.

Cross Reference.—As to effect of secured transaction provisions of Uniform Commercial Code, see § 25-9-201.

Carolina, see 47 N.C.L. Rev. 761 (1969).

Cited in Northcutt v. Clayton, 269 N.C. 426, 152 S.E.2d 471 (1967).

Editor's Note.—

For comment on usury law in North

§ 53-166. Scope of article; evasions; penalties; loans in violation of article void.—(a) Scope.—No person shall engage in the business of lending in amounts of nine hundred dollars (\$900.00) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by G.S. 24-1.1, except as provided in and authorized by this article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(1969, c. 1303, ss. 13, 14.)

Editor's Note. — Session Laws 1969, c. 1303, s. 13, effective Aug. 1, 1969, substituted "nine hundred dollars (\$900.00)" for "six hundred dollars (\$600.00)" near the beginning of the first sentence of subsection (a). Session Laws 1969, c. 1303, s. 14, effective July 2, 1969, substituted "permitted by G.S. 24-1.1" for "six percent (6%) per annum" near the end of the first sentence of subsection (a). Section 27 of the 1969 act provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

All loan agencies subject to the provisions of § 105-88 are not subject to the

provisions of the Consumer Finance Act. Section 105-88 applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

And Act Does Not Apply to Insurance Premium Finance Companies. — Had the legislature intended to subject to the provisions of the Consumer Finance Act those who make loans solely to finance insurance premiums, surely it would not have enacted article 4 of chapter 58 in the first instance since it exempts from its provisions those subject to the Consumer Finance Act. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-167. Expenses of supervision.

Fee Is in Addition to Privilege Tax.—In addition to the fee required by this section, each licensee under the Consumer Finance Act also pays the \$750.00 privilege tax exacted by § 105-88. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

And Is Intended to Pay Expenses of Supervision.—The fees exacted of insur-

ance premium financiers by § 58-56 and of persons engaged in business under the Consumers Finance Act by this section are intended to pay the necessary expenses of licensing, regulating, and supervising the business. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting.

(c) Existing Business.—Notwithstanding the provisions of this section, any person, firm or corporation not presently licensed under this article, but holding a license on January 1, 1969, issued pursuant to the provisions of G.S. 105-88, shall upon application within not more than sixty days of the effective date of this subsection, receive a license under this article if the person shall meet the requirements of subdivisions (2) and (3) of subsection (a) of this section, and during such sixty-day period such person shall be deemed a licensee under this article.

(1969, c. 1303, s. 15.)

Editor's Note. — The 1969 amendment rewrote subsection (c). Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective

date. The act was ratified July 2, 1969, and made effective on ratification.

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 53-172. Conduct of other business in same office.—No licensee shall conduct the business of making loans under this Article within any office, suite, room, or place of business in which any other business is solicited or engaged in unless, in the opinion of the Commissioner, such other business would not be contrary to the best interests of the borrowing public and is authorized by the Commissioner in writing.

If the conduct of any other business authorized by the Commissioner should, in the opinion of the Commissioner, prove contrary to the best interests of the borrowing public, the authority granted to conduct such business shall be withdrawn in writing by the Commissioner.

Installment paper dealers as defined in G.S. 105-83, and the collection by a licensee of loans legally made in North Carolina, or another state by another government regulated lender or lending agency, shall not be considered as being any other business within the meaning of this section. This section shall not be construed as authorizing the collection of any loans or charges in violation of the prohibitions contained in G.S. 53-190. The books, records, and accounts relating to loans shall be kept in such manner as the Commissioner of Banks prescribes as to delineate clearly the loan business from any other business authorized by the Commissioner. (1961, c. 1053, s. 1; 1967, c. 769, s. 1; 1971, c. 1212.)

Editor's Note. — The 1971 amendment rewrote this section as previously amended in 1967.

§ 53-173. Maximum rate of charge. — Every licensee hereunder may contract for and receive charges on any loan of money not exceeding nine hundred dollars (\$900.00) in amount repayable in substantially equal consecutive monthly installments as follows:

- (1) The charge for payment according to schedule may be computed on the amount of the cash advance for the full term of the contract without regard to the requirement for installment payments at rates not exceeding eighteen dollars (\$18.00) per one hundred dollars (\$100.00) per annum on that part of the amount of cash advance not exceeding three hundred dollars (\$300.00), ten dollars (\$10.00) per one hundred dollars (\$100.00) per annum on that part of the cash advance exceeding three hundred dollars (\$300.00) but not exceeding six hundred dollars (\$600.00), eight dollars (\$8.00) per one hundred dollars (\$100.00) per annum on that part of the cash advance exceeding six hundred dollars (\$600.00) but not exceeding nine hundred dollars (\$900.00).
- (2) On loans of ninety-five dollars (\$95.00) or less, a licensee may charge, in lieu of the charges specified in subdivision (1) of this section, at a rate not in excess of one dollar (\$1.00) for each five dollars (\$5.00) of cash advance to the borrower up to the amount of ninety-five dollars (\$95.00) and a period of at least fifteen (15) days must be allowed for repayment of each five dollars (\$5.00) cash advance. Such charges shall not be assessed by any subterfuge or device on any loan over ninety-five dollars (\$95.00) or on any balance of ninety-five dollars (\$95.00) or less when the original loan was greater than ninety-five dollars (\$95.00).
- (3) The charge for payment according to schedule shall be computed at the time the loan is made and when computed shall be added to the cash advance. A licensee shall compute monthly charges for a period of time less than one year at one twelfth of the annual rate for each loan month and shall compute charges for a period of less than one loan month at one thirtieth of one twelfth of the annual rate for each day. A loan month is that period of time from one date in the month through the corresponding date in the next month. If there is no corresponding date, then the last day of the next month will be used. All payments

made on account, except those applied to default or deferment charges, shall be applied to the unpaid installments in the order in which they are due.

- (4) The licensee shall not fix a due date of the first installment of any loan contract providing for monthly installments for a term exceeding forty-five (45) actual days from the date of the loan. When the first payment of any such contract may be due on a date beyond a loan month defined above, a licensee will be permitted to make an additional charge for the number of days in excess of thirty (30) or the number of days in excess of one loan month from the date of the loan, whichever is less. The charge for the extra days may be added to the amount of the first installment and shall be excluded in computing any rebate.
- (5) Subject to the limitations contained in this article as to maximum rates, the Commission may from time to time, upon the basis of changed conditions or facts, redetermine and refix any such maximum rates of charge, but, before determining or redetermining any such maximum rates, the Commission shall give reasonable notice of its intention to consider doing so to all licensees and a reasonable opportunity to be heard and introduce evidence with respect thereto. The notice herein required may be given by mailing such notice to the offices of the licensees as shown in the records of the Commissioner of Banks. Any such changed maximum rates of charge shall not affect preexisting loan contracts lawfully entered into between any licensee and any borrower.
- (6) If, as of an installment due date the payment dates of all unpaid installments are deferred for one or more full months and the maturity of the contract is extended for a corresponding period, the licensee may charge and collect a deferment charge, which shall not exceed that portion of the charge for payment according to schedule originally added to the cash advance attributable under the rule of seventy-eights (78's) or the sum of the digits principle to the first of the deferred monthly installment periods multiplied by the number of months in which no schedule payment has been made or in which no payment is required by reason of the deferment. The Banking Commission may promulgate any further rules and regulations which may be necessary with regard to the provisions of this subdivision. (1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 17-22.)

Editor's Note. — The 1969 amendment substituted "nine hundred dollars (\$900.00)" for "six hundred dollars (\$600.00)" in the opening paragraph, inserted "repayable in substantially equal consecutive monthly installments" in the opening paragraph, rewrote subdivision (1), substituted "ninety-five dollars (\$95.00)" for "seventy-five dollars (\$75.00)" throughout subdivision (2), added the first and last sentences of subdivision (3), added the last sentence of subdivision (4) and added subdivision (6). The substitution of "nine hundred dollars (\$900.00)" for "six hundred dollars (\$600.00)" in the opening paragraph and the amendments to subdivisions (1) and (2) are effective Aug. 1, 1969; the other

amendments to this section are effective July 2, 1969. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 76 (1969). For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Small loan operations are subject to state regulation, and enjoy the higher interest rates allowed by this section. Generally speaking, their loans under \$900 are allowed to be made at interest rates substantially higher than rates allowed to other lenders. *United States v. Wachovia Corp.*, 313 F. Supp. 632 (W.D.N.C. 1970).

§ 53-174. Refund.—When any loan contract is paid in full by cash, a new loan, renewal or otherwise, after three loan months have expired, the licensee shall

refund or credit the borrower with that portion of the total charges which shall be due the borrower as determined by schedules prepared under the rule of 78's or sum of the digits principle as follows:

"The amount of the refund or credit shall be at least as great a proportion of the total charges originally contracted for, excluding any adjustment made for a first period of more than one (1) month, as the sum of the consecutive monthly balances of the contract scheduled to follow the date of prepayment bears to the sum of all the consecutive monthly balances of the contract, those sums to be determined according to the payment schedule originally contracted for." If a loan is prepaid in full by cash, a new loan, renewal or otherwise, two loan months or less from the date of the contract, the licensee shall make a pro rata refund of the charges to the borrower or shall credit such amount to the borrower. In computing any required refund, any prepayment made on or before the 15th day following an installment date shall be deemed to have been made on the installment date preceding such prepayment and any prepayment made after the 15th day following an installment date shall be deemed to have been made on the installment date following such installment; provided, such computation shall not result in refunds by the rule of 78's method on loans prepaid three loan months or less from the date of the contract. When loans are prepaid fifteen (15) days or less from the date the loan is made, licensees are authorized in computing refunds to divide the original add-on charge by that figure which represents the number of loan months in the contract. The original add-on charges less the resultant quotient shall constitute the amount of the refund; provided, whenever the resultant quotient is less than two dollars (\$2.00), the minimum charge shall be fixed at two dollars (\$2.00) or the total original add-on charges, whichever is the lesser. The tender by the borrower, or at his request, of an amount equal to the unpaid balance less the required refund must be accepted by the licensee in full payment of the contract. (1961, c. 1053, s. 1; 1969, c. 1303, s. 14.1.)

Editor's Note. — The 1969 amendment substituted "three" for "two" near the beginning of the first paragraph and near the end of the third sentence in the second paragraph. Session Laws 1969, c. 1303, s.

27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

§ 53-175. Default charge.

(b) If there is an unpaid balance on a loan at the maturity date as originally scheduled or as deferred, an additional charge at a rate not to exceed six percent (6%) per annum may be charged on the outstanding balance until the loan is paid in full by cash, a new loan, renewal or otherwise. (1961, c. 1053, s. 1; 1969, c. 1303, s. 23.)

Editor's Note. — The 1969 amendment substituted "as originally scheduled or as deferred" for "of the original contract" near the beginning of subsection (b). Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor

shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

As subsection (a) was not changed by the amendment, it is not set out.

§ 53-176. Optional rates, maturities and amounts.—In lieu of making loans in the amount, for the term and at the charges stated respectively in G.S. 53-166, 53-173 and 53-180, a licensee may at any time elect to make loans in installments not exceeding five thousand dollars (\$5,000.00) and which shall not be repayable in less than six months or more than sixty months and which shall not be secured by first deeds of trust or first mortgages on real estate and which are repayable in substantially equal consecutive monthly payments and to charge and collect interest in connection therewith which shall not exceed an effective rate of fifteen percent (15%) per annum upon the outstanding balance: Provided, however, a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per pay-

ment may be agreed to and charged in lieu of interest. The due date of the first monthly payment shall not be more than forty-five days following the disbursement of funds under any such installment loan. A borrower under this section may prepay all or any part of a loan made under this section without penalty. Such election shall be made by the filing of a written statement to that effect by the licensee with the Commissioner and can be terminated by cancellation notice filed by the licensee in writing with the Commissioner.

No individual, partnership, or corporate licensee and no corporation which is the parent, subsidiary or affiliate of a corporate licensee which is making loans under this article otherwise than as authorized specially in this section, shall be permitted to make loans under the provisions of this section. Any corporate licensee or individual or partnership licensee making an election to make loans in accordance with the provisions of this section shall respectively be bound by such election with respect to all of its offices and locations in this State and all offices and locations in this State of its parent, subsidiary or affiliated corporate licensee, or with respect to all of his or their offices and locations in this State. (1961, c. 1053, s. 1; 1969, c. 1303, s. 12.1.)

Editor's Note. -- The 1969 amendment shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

§ 53-176.1. Motor vehicle lenders.—(a) Notwithstanding the provisions of G.S. 53-168, any person, firm or corporation not presently licensed under this article, but holding a license on January 1, 1969, issued pursuant to the provisions of G.S. 105-88, shall upon application within not more than sixty days of July 2, 1969, receive a license under this article as a motor vehicle lender if the person shall meet the requirements of subdivisions (2) and (3) of subsection (a) of G.S. 53-168, and during such sixty-day period, such person shall be deemed a licensee as a motor vehicle lender under this article. Following such sixty-day period, any person applying for a license as a motor vehicle lender shall meet all the requirements of G.S. 53-168. A "motor vehicle lender" shall mean any person, firm or corporation licensed under this article to make loans to borrowers, as authorized in this section, secured by a security interest in a motor vehicle, and whose license shall indicate on the face thereof that such licensee is a motor vehicle lender. A motor vehicle lender is permitted to make loans only under the provisions of this section. No office holding a license under the provisions of this section and making loans secured by motor vehicles may make loans under the provisions of G.S. 53-166, G.S. 53-173, G.S. 53-180, or G.S. 53-141, nor shall such office allow or permit loans under the other provisions of this article to be made on its premises or any connecting premises. All other provisions of this article not inconsistent with this section shall apply to a "motor vehicle lender."

(b) A motor vehicle lender may make loans in any amount at rates not exceeding fifteen dollars (\$15.00) per hundred dollars per annum on that part of the cash advance not exceeding five hundred dollars (\$500.00); eleven dollars (\$11.00) per one hundred dollars per annum on that part of the cash advance exceeding five hundred dollars (\$500.00) but not exceeding one thousand dollars (\$1,000.00); and nine dollars (\$9.00) per one hundred dollars per annum on that part of the cash advance exceeding one thousand dollars (\$1,000.00) but not exceeding fifteen hundred dollars (\$1,500.00). Rates on any cash advance in excess of fifteen hundred dollars (\$1,500.00) shall not exceed the equivalent of sixteen percent (16%) simple interest per annum on the entire amount of the cash advance, provided, that loans made pursuant to this section shall not exceed the sum of five thousand dollars (\$5,000.00) and shall not exceed a term of forty-

eight months, and shall be secured solely by motor vehicles. (1969, c. 1303, s. 16.)

Editor's Note.—Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply

to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

§ 53-178. No further charges; no splitting contracts; certain contracts void.

Editor's Note.—For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-179. Multiple office loan limitations. — A licensee shall not grant a loan in one office to any borrower who already has a loan in another office operated by the same entity or by an affiliate, parent, subsidiary or under the same ownership, management or control, whether partial or complete. This section shall apply to intrastate and interstate operations. A licensee shall take every reasonable precaution to prevent granting loans in violation of this section. Such loans granted inadvertently resulting in a total liability of nine hundred dollars (\$900.00) or less, shall be adjusted to the rates applicable under this article to a single loan of equivalent amount, and when the total liability on such loans is in excess of nine hundred dollars (\$900.00), interest shall be adjusted to simple interest at six percent (6%) per year on the entire obligation. (1961, c. 1053, s. 1; 1969, c. 1303, s. 13.)

Editor's Note. — The 1969 amendment, effective Aug. 1, 1969, substituted "nine hundred dollars (\$900.00)" for "six hundred dollars (\$600.00)" in two places in

the last sentence. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

§ 53-180. Time and payment limitation.—Except as otherwise provided in this chapter, no licensee shall enter into any contract of loan under this article providing for any scheduled repayment of principal more than twenty-five months from the date of making the contract if the cash advance is six hundred dollars (\$600.00) or less, nor more than thirty months from the date of making the contract if the cash advance is in excess of six hundred dollars (\$600.00). Every loan contract shall require payment of cash advance and charges, as aggregated, in installments which shall be payable at approximately equal monthly intervals. No installment contracted for shall be substantially larger than any preceding installment except as authorized by this article. (1961, c. 1053, s. 1; 1969, c. 1303, s. 24.)

Editor's Note. — The 1969 amendment, effective Aug. 1, 1969, rewrote this section. Session Laws 1969, c. 1303, s. 27, provides

that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

§ 53-188. Review of regulations, order or act of Commission or Commissioner.

Cited in *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 53-189. Insurance.

(e) **Credit Life and Property Loss Insurance.**—No licensee shall, directly or indirectly, receive any commission, premium or profit from the sale of credit insurance except when issued in connection with a loan made pursuant to the provisions of this article, nor shall any licensee directly or indirectly receive any commission, premium or profit from the sale of any property loss insurance except on property used as collateral to secure any such loan; provided, where a licensee requires any such insurance, the borrower may, if he chooses, purchase such insurance from a source other than the licensee; provided further, that property

loss insurance can be required only on a loan secured by a motor vehicle or improved real estate.

(1969, c. 1303, s. 25.)

Editor's Note. — The 1969 amendment rewrote subsection (e). Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

The act was ratified July 2, 1969, and made effective on ratification.

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 53-190. Loans made elsewhere.—No loan contract made outside this State in the amount or of the value of nine hundred dollars (\$900.00) or less for which a greater consideration or charges than are authorized by § 53-173 of this article have been charged, contracted for, or received shall be enforced in this State and every person in anywise participating therein in this State shall be subject to the provisions of this article; provided, that the foregoing shall not apply to loans legally made in another state. No lender licensed to do business under this article may collect, or cause to be collected, any loan made by a lender in another state to a borrower who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition. (1961, c. 1053, s. 1; 1967, c. 769, s. 2; 1969, c. 1303, s. 13.)

Editor's Note.—The 1967 amendment added the last two sentences.

The 1969 amendment, effective Aug. 1, 1969, substituted "nine hundred dollars (\$900.00)" for "six hundred dollars (\$600.00)" near the beginning of the section.

Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall it apply to any loan made prior to its effective date.

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 53-191. Businesses exempted. — Nothing in this article shall be construed to apply to any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations organized under the laws of North Carolina, production credit associations organized under the act of Congress known as the Farm Credit Act of 1933, pawnbrokers lending or advancing money on specific articles of personal property, industrial banks, the business of negotiating loans on real estate as defined in G.S. 105-41, nor to installment paper dealers as defined in G.S. 105-83 other than persons, firms and corporations engaged in the business of accepting fees for endorsing or otherwise securing loans or contracts for repayment of loans. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, s. 26.)

Editor's Note. — The 1969 amendment deleted, near the beginning of the section, a provision exempting any person, firm or corporation engaged solely in the business of making loans of fifty dollars or more secured by motor vehicles. Session Laws 1969, c. 1303, s. 27, provides that the act shall not affect pending litigation, nor shall

it apply to any loan made prior to its effective date. The act was ratified July 2, 1969, and made effective on ratification.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 16.

Sale of Checks Act.

§ 53-197. Investigation fee.

Cited in *Mathis v. Minnesota Mut. Life Ins. Co.*, 302 F. Supp. 998 (M.D.N.C. 1969).

Chapter 53A.

Business Development Corporations.

§ 53A-15. Tax exemptions and credits.

(e) In computing entire net income there shall be allowed as deductions the following items:

- (1) All ordinary and necessary expenses paid or accrued during the taxable year.
- (2) Rental expense paid or accrued during the taxable year.
- (3) All unearned discount and interest paid during the taxable year except interest paid in connection with income exempt from taxation under article 4 of chapter 105 of the General Statutes and except interest deemed excessive under G.S. 105-130.6.
- (4) Taxes paid or accrued except taxes based on net income, taxes assessed for local benefit of a kind tending to increase the value of the property assessed and any other taxes not deductible for corporate income tax purposes under division I of article 4 of chapter 105 of the General Statutes.
- (5) Dividends received from stock issued by any corporation to the extent provided in G.S. 105-130.7.
- (6) Net economic losses to the extent provided in G.S. 105-130.8 and other losses as provided in division I of article 4 of chapter 105 of the General Statutes.
- (7) Loans or debts ascertained to be worthless and actually charged off during the taxable year, if connected with business and if the amount has previously been included in gross income in a return under this section; or, in the discretion of the Secretary of Revenue, a reasonable addition to a reserve for bad debts. Provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable hereunder.
- (8) A reasonable allowance for depreciation and obsolescence to the extent provided for corporation income tax purposes in division I of article 4 of chapter 105 of the General Statutes.
- (9) Contributions to religious, charitable, educational, literary and like organizations to the extent provided in subdivision (1) of G.S. 105-130.9.
- (10) Contributions to the State of North Carolina, any of its institutions, instrumentalities, agencies, or political subdivisions, and contributions to educational institutions located within North Carolina as provided in subdivision (2) of G.S. 105-130.9.
- (11) Reasonable contributions to qualified employees' pension trusts within the taxable year; provided, exemption of any such trust under the federal income tax laws shall constitute prima facie evidence that it is a "qualified employees' pension trust" within the meaning of this subdivision.
- (12) Premiums paid upon the purchase of bonds to the following extent:
 - a. Amortization of bond premiums on tax-exempt bonds shall be mandatory for all taxpayers. Amortization for the taxable year shall be accomplished by lowering the basis or adjusted basis of the bond with no deduction against gross income for the year.
 - b. For purposes of this subsection, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation and bearing interest and in-

cludes any like obligation issued by any government or political subdivision thereof.

- (13) Interest upon the obligations of the State of North Carolina or a political subdivision thereof received or accrued during the taxable year. Provided, that the deduction of accrued interest shall be permitted only if the taxpayer has included accrued income in his gross income for the taxable year. Provided further that in the event that any court of competent jurisdiction shall rule that the deduction of the interest of the obligations of the State of North Carolina or a political subdivision thereof from the base of the tax levied by this article violates the Constitution of this State or the Constitution of the United States, such deduction shall be disallowed and such interest shall be included in the entire net income of the taxpayer.
- (14) Reasonable payments made to the beneficiaries or to the estate of a deceased employee, paid by reason of the death of the employee to the extent provided for corporate income tax purposes in division I of article 4 of chapter 105 of the General Statutes.
- (15) Deduction of accrued expenses, contributions, taxes, rental expense, or interest expense shall be subject to the limitations imposed upon corporate income taxpayers by article 4 of chapter 105 of the General Statutes.

(f) On or before June 1 of each year, the executive officer or officers of each corporation shall file with the Secretary of Revenue a full and accurate report of all income as defined in subsection (d) of this section received or accrued during the taxable year, and also an accurate record of the legal deductions in the same calendar year as allowed by subsection (e) of this section to the end that the correct entire net income of the corporation may be determined. This report shall be in such form and contain such information as the Secretary of Revenue may specify. At the time of making such report by each corporation, the taxes levied by this section with respect to an excise tax on corporations organized pursuant to this Chapter shall be paid to the Secretary of Revenue.

(h) All provisions of Subchapter I of Chapter 105 of the General Statutes, not inconsistent with this section, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the tax imposed by this section. The Secretary of Revenue, may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this section.

(1967, c. 1110, s. 11; 1973, c. 476, s. 193.)

Editor's Note.—

The 1967 amendment, effective for taxable years beginning on or after Jan. 1, 1967, rewrote subsection (e).

Section 16, c. 1110. Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1973 amendment, effective July 1, 1973, substituted "Secretary of Revenue" for "Commissioner of Revenue" in subsections (e) (7), (f) and (h).

As the rest of the section was not changed by the amendments, only subsections, (e), (f) and (h) are set out.

Chapter 54.

Co-Operative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

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SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

ARTICLE 1.

Organization.

§ 54-1. Application of terms.

Editor's Note.—

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Stated in *Mutual Sav & Loan Ass'n v. Lanier*, 279 N.C. 299, 182 S.E.2d 368 (1971).

§ 54-2. **Method of incorporation; powers.**—(a) It shall be lawful for any persons in any city, town or county of this State, under any name by them to be assumed, to associate for the purpose of organizing and establishing a homestead and building and loan association, and, being so associated, they shall, on complying with this Subchapter, be a body politic and corporate, and as such be capable in law to hold and dispose of property, both real and personal; may have and use a common seal; may choose a presiding and other officers; may enact bylaws for the regulation of the affairs of such corporation, and compel the due observance of the same by fines and penalties; may sue and be sued, plead and be impleaded, answer and be answered in any court in this State, and do all acts necessary for the well ordering and good government of the affairs of such corporation, and shall exercise all and singular the powers incident to bodies politic and corporate: Provided, that before any such corporation shall be entitled to the privileges of this Subchapter it shall file with the register of deeds of the county where such corporation is designed to act a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such register of deeds, and shall pay a tax of twenty-five dollars (\$25.00) to the register of deeds, which tax shall be paid over by the register of deeds to the treasurer of the county, to the use of the school fund of the county. The register of deeds shall certify a copy of the charter to the Administrator of the Savings and Loan Division. The register of deeds shall not issue or record the same until duly authorized to do so by the Administrator of the Savings and Loan Division as hereinafter provided.

(b) Upon receipt of a copy of the certificate of incorporation of the proposed association, the Administrator of the Savings and Loan Division shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business for which it is organized, the Administrator of the Savings and Loan Division shall so certify to the register of deeds in the county in which organized, who shall thereupon issue and record such certificate of incorporation. But the Administrator of the Savings and Loan Division may refuse to so certify, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any purpose other than a mutual building and loan business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said building and loan association is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment; or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted or appro-

propriated by an existing association in the same county, or so similar thereto as to be likely to mislead the public.

(c) Upon receipt of such certificate from the Administrator of the Savings and Loan Division, the register of deeds shall, if said certificate of incorporation be in accordance with law, issue and cause same to be recorded in the records of his office as hereinabove provided. (1905, c. 435, s. 1; Rev., s. 3877; C. S., s. 5170; 1931, c. 73; 1967, c. 823, s. 4; 1971, c. 864, s. 17.)

Cross References.—

See Editor's note to § 53-5.

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" and for

"clerk" in subsection (a) and for "clerk of court" in subsections (b) and (c).

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" throughout the section.

§ 54-6. When to begin business.—Upon filing the certificate of incorporation with the register of deeds of the county where the principal office of the corporation is located, and with the Administrator of the Savings and Loan Division, the company shall become a body politic and corporate, and shall be authorized to begin business, when licensed by the Administrator of the Savings and Loan Division. (Code, s. 2297; Rev., s. 3880; 1907, c. 959, s. 1; C. S., s. 5173; 1967, c. 823, s. 5; 1971, c. 864, s. 17.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" near the beginning of the section.

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" in two places in the section.

§ 54-11. Conversion of building and loan associations into federal savings and loan associations.—Any corporation organized and existing under the laws of this State and operating as a building and loan association may convert itself into a federal savings and loan association pursuant to an act of Congress, approved June 13, 1933, entitled "Home Owners' Loan Act of Nineteen Hundred and Thirty-three," and any amendments thereto, with the same force and effect as though originally incorporated under such act of Congress, and the procedure to effect such conversion shall be as follows:

- (1) The directors shall submit a plan of conversion to the Administrator of the Savings and Loan Division, and he may approve the same, with or without amendment, or disapprove the plan. If he approve the plan, then same shall be submitted to the shareholders as provided in the next subdivision.
- (2) A meeting of the shareholders shall be held upon not less than 10 days' written notice to each shareholder, served personally or sent by mail to the last known address of such shareholder, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this corporation into a federal savings and loan association, pursuant to act of Congress approved June thirteenth, nineteen hundred and thirty-three." The secretary or other officer of the corporation shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.
- (3) At the meeting of the shareholders of such corporation, called and held as above provided, such shareholders may, by affirmative vote of a majority of shareholders present, in person or by proxy, declare by resolution the determination to convert said corporation into a federal

savings and loan association. A copy of the minutes of the proceedings of such meeting of the shareholders certified by the president or vice-president and secretary or assistant secretary of the corporation shall be filed in the office of the Administrator of the Savings and Loan Division of this State within five days after such meeting, and a like copy shall also be filed in the office of the register of deeds of the county in which such corporation has its principal office. Each of said certified copies when so filed shall be presumptive evidence of the holding and the action of such meeting.

- (4) Within a reasonable time after the receipt of a certified copy of the minutes of said meeting the Administrator of the Savings and Loan Division shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the conversion and proceedings and send the same to the corporation. Such certificate shall be recorded in the office of the register of deeds of the county in which the corporation has its principal office, and the original shall be held by the corporation. If the Administrator disapproves such proceedings he shall mark the certified copy of minutes in his office disapproved and notify the corporation to that effect.
- (5) Within 60 days after approval of the proposed proceedings by the Administrator of the Savings and Loan Division, the officers of said corporation shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make it a federal savings and loan association, and there shall thereupon be filed in the office of the Administrator of the Savings and Loan Division a copy of the charter or authorization issued to such corporation by the federal home loan bank board, or a certificate showing the organization or conversion of such corporation into a federal savings and loan association, and upon such filing with the Administrator of the Savings and Loan Division the corporation shall cease to be a State corporation and shall be deemed to be converted into a federal savings and loan association.
- (6) Whenever any such corporation shall so convert itself into a federal savings and loan association it shall thereupon cease to be a corporation under the laws of this State, except that its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its concerns as a State corporation, and to dispose of and convey its property. At the time when such conversion becomes effective all the property of the State corporation, including all its right, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal savings and loan association, which shall have, hold and enjoy the same in its right as fully and to the same extent as the same was possessed, held and enjoyed by the State corporation; and the federal savings and loan association as of the time of the taking effect of such conversion shall succeed to all the rights, obligations and relations of the State corporation.
- (7) Any such corporation may, instead of effecting the conversion above provided, at a meeting called and held as above outlined, authorize the sale of all or any portion of its assets, subject to the approval of the Administrator of the Savings and Loan Division, to a federal sav-

ings and loan association or to a building and loan association of this State, and subject to the approval of the Administrator of the Savings and Loan Division, may authorize the taking of stock in the association so buying the assets in payment thereof; and upon liquidation of the selling corporation the stock so received shall be distributed to its shareholders. In the event such sale shall be authorized, and approved by the Administrator of the Savings and Loan Division, the directors and officers shall have full power and authority to do any and everything necessary to carrying same into effect. (1935, c. 104; 1967, c. 823, s. 6; 1971, c. 864, s. 17.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in the second sentence of subdivision (3) and the third sentence of subdivision (4).

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" and "Commissioner of Insurance" throughout the section and "Administrator" for "Commissioner" in subdivision (4).

§ 54-12. Conversion of federal association into State association.

—Any federal savings and loan association organized and existing under the Home Owners' Loan Act of 1933, as amended, may convert into a building and loan association, pursuant to the provisions of this Chapter, with the same force and effect as though originally incorporated under the provisions of this Subchapter, by complying with the acts of Congress and the requirements of federal regulatory authority, and also by following the procedure as set out below:

- (1) The directors of such federal savings and loan association shall submit a plan of conversion to the federal home loan bank board (hereinafter referred to as "board") or other federal regulatory authority, and also to the Administrator of the Savings and Loan Division of the State of North Carolina. When such plan has been approved, either with or without amendment by both of said authorities, then said plan shall be submitted to the members of such association as provided in the next subdivision.
- (4) Within 30 days after the approval of said proceedings by the board, the officers of said association shall file with the register of deeds of the county where such association is designed to act a copy of the certificate of incorporation of such association, signed by at least seven members, to be recorded in the office of such register of deeds. Such certificate of incorporation shall conform to the provisions of the laws of this State. The register of deeds shall certify a copy of the certificate to the Administrator of the Savings and Loan Division, and shall not issue or record the same until duly authorized to do so by the Administrator of the Savings and Loan Division. Upon receipt of a copy of the certificate of incorporation the Administrator of the Savings and Loan Division shall at once examine into the facts connected with the conversion of such association, and, if it appears that such association if converted will be lawfully entitled to commence business as a building and loan association pursuant to the laws of this State, the Administrator of the Savings and Loan Division shall so certify to the register of deeds in the county in which the association will be located, who shall thereupon issue and record such certificate of incorporation. Upon the issuance and recordation of such certificate of incorporation the association shall file with the board a certified copy of same. Thereupon the association shall cease to be a federal savings and loan association and shall be deemed to be converted into a building and loan

association under the laws of this State, whose corporate existence shall be deemed then to begin.

(1967, c. 823, s. 7; 1971, c. 864, s. 17.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court," "clerk" and "clerk of the court" throughout subdivision (4).

The 1971 amendment substituted "Administrator of the Savings and Loan Divi-

sion" for "Insurance Commissioner" in subdivision (1) and for "Commissioner of Insurance" in four places in subdivision (4).

As the rest of the section was not changed by the amendments, only the opening paragraph and subdivisions (1) and (4) are set out.

§ 54-12.1. Merger of building and loan associations. — Any two or more building and loan associations organized or to be organized, or existing under the laws of this State and operating under the provisions of this Subchapter, may merge into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

- (2) Such merger agreement together with the copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective meetings shall be submitted to the Administrator of the Savings and Loan Division, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the shareholders of each of the associations proposing to merge will be benefited thereby, shall, in writing, approve same, or shall, if he deems that the proposed merger will not be in the interest of all members of the association so merging, disapprove, in writing, the same. If he approve the merger agreement, then same shall be submitted, within 30 days after notice to such associations of such approval, to the shareholders of each of such associations, as provided in the next subdivision.
- (4) At separate meetings of the shareholders of each of such associations, called and held as above provided, such shareholders representing a majority of the outstanding shares of stock entitled to vote, by affirmative vote of at least two thirds of the shareholders present, in person or by proxy, may declare by resolution the determination to merge into a single association upon terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the Administrator of the Savings and Loan Division. Members of the associations who do not attend the meetings or who do not vote thereat, shall, if the merger is so approved by the members, be deemed to consent to the merger. Upon the adoption of such resolution, a copy of the minutes of the proceedings of such meetings of the shareholders of the respective associations, certified by the president or vice-president and secretary or assistant secretary of the merging associations, shall be filed in the office of the Administrator of the Savings and Loan Division of this State, within 10 days after such meetings, and within 15 days after the receipt of a certified copy of the minutes of said meetings the Administrator of the Savings and Loan Division shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the merger and send same to each of said associations. Such certificate shall be filed and recorded in the office of the register of deeds of the county

or counties in this State in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members of the associations so merging, and the same shall thence be taken and deemed to be the act of merger of such constituent building and loan associations under the laws of this State, and such record or certified copy thereof shall be evidence of the agreement and act of merger of said building and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the Administrator shall disapprove the proceedings he shall mark the certified copies of the meetings in his office disapproved and notify the associations to that effect.

(1967, c. 823, s. 8; 1971, c. 864, s. 17.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in the fifth sentence of subdivision (4).

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in

subdivision (2) and for "Commissioner of Insurance" in three places in subdivision (4) and substituted "Administrator" for "Commissioner" in the last sentence of subdivision (4).

As the rest of the section was not changed by the amendments, only the opening paragraph and subdivisions (2) and (4) are set out.

ARTICLE 2.

Shares and Shareholders.

§ 54-14. Different classes of shares; dividends; reserve fund.—Every building and loan association doing business in this State shall be authorized to issue as many series or classes and kinds of shares and at such stated periods as may be provided for in its charter or bylaws, or by the federal home loan bank and Federal Savings and Loan Insurance Corporation for federal savings and loan associations, subject to such regulations and limitations as the Administrator of the Savings and Loan Division may prescribe: Provided, the dividends on paid-up stock shall be less than the association is earning, and such stock may have the right to share in the dividends between the rate paid and the earned per centum. Every association shall at all times have on hand and unpledged, investments in obligations of the United States government or the government of the State of North Carolina, or stock in the federal home loan bank, or bonds issued by the federal home loan bank, or on deposit in such bank or banks as may have been approved by a majority of the entire board of directors, an amount equal to at least five per centum of the aggregate amount of paid-up stock outstanding, as shown by the books of the association. When the aggregate of investment or funds in hand or on deposit as herein provided falls below the amount required under this section, the association shall make no new real estate loans until the required amount has been accumulated: Provided, that the refinancing, recasting or renewal of loans previously made, and/or loans made as a result of foreclosure sales under instruments held by the interested building and loan association, shall not be considered as new loans within the meaning of this section. (1905, c. 435, s. 6; Rev., s. 3889; 1907, c. 959, s. 3; 1919, c. 179, s. 3; C. S., s. 5177; 1931, c. 107; 1933, c. 26; 1941, c. 67; 1967, c. 556; 1971, c. 864, s. 17.)

Editor's Note.—

The 1967 amendment inserted, immedi-

ately preceding the proviso to the first sentence, "or by the federal home loan

bank and Federal Savings and Loan Insurance Corporation for federal savings and loan associations, subject to such regulations and limitations as the Commissioner of Insurance may prescribe."

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" in the first sentence.

§ 54-18. Minors as shareholders.

Stated in *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E.2d 19 (1970).

ARTICLE 2A.

Savings Accounts.

§ 54-18.3. Savings accounts authorized; terms of payment and withdrawal.—Notwithstanding any other provisions of law, any building and loan association or savings and loan association incorporated under the laws of this State or any federal savings and loan association having its principal office in North Carolina is authorized to raise capital in the form of such savings deposits or savings accounts as are authorized by its charter or by regulation of the Administrator of the Savings and Loan Division and may issue such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized. Holders of savings accounts and obligors of an association shall to such extent as may be provided by its charter or by regulations of the Administrator of the Savings and Loan Division, be members of the association, and shall have such voting rights and such other rights as are thereby provided. Except as may be otherwise authorized by the association's charter or regulation of the Administrator of the Savings and Loan Division in the case of savings accounts for fixed or minimum terms of not less than 30 days, the payment of any savings account shall be subject to the right of the association to require such advance notice, not less than 30 days, as shall be provided for by the charter of the association or the regulations of the Administrator of the Savings and Loan Division. The payment of withdrawals from savings accounts in the event an association does not pay all withdrawals in full (subject to the right of the association to require notice) shall be subject to such rules and procedures as may be prescribed by the association's charter or by regulation of the Administrator of the Savings and Loan Division. Savings accounts shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but the Administrator of the Savings and Loan Division may by regulation provide for withdrawal or transfer of savings accounts upon nontransferable order or authorization. To such extent as the Administrator of the Savings and Loan Division may authorize by regulation or advice in writing, an association may borrow, may give security, and may issue such notes, bonds, debentures, or other obligations, or other securities as the Administrator of the Savings and Loan Division may so authorize. (1969, c. 449, s. 1; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" throughout the section.

§ 54-18.4. Reserve fund required.—Any capital raised pursuant to the provisions of G.S. 54-18.3 shall be added to the amount of capital raised by the issuance of stock of the association for the purposes of determining the amount of the reserve fund required by G.S. 54-14. (1969, c. 449, s. 2.)

§ 54-18.5. Administrator of the Savings and Loan Division to adopt rules and regulations.—The Administrator of the Savings and Loan Division shall adopt rules and regulations for the implementation of the authority herein vested in savings and loan associations. (1969, c. 449, s. 3; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance."

ARTICLE 3.

Loans.

§ 54-20. **Direct reduction of principal.**—The board of directors of any building and loan association, heretofore or hereafter organized under the laws of this State, may, unless specifically prohibited by the certificate of incorporation, constitution or bylaws of the association, by resolution or bylaw, permit borrowing members to repay their indebtedness by a direct monthly or periodical reduction of principal method. In every such case the borrower shall in writing make such agreement with the association relative to the repayment of his indebtedness as the directors may require. The agreement shall stipulate that the borrower or debtor shall make periodical payments, not less frequently than once a month, until such mortgage indebtedness and advances, if any, made by the association for payment of taxes, assessments, insurance premiums and other purposes, as may be owing from the borrower to the association, with interest thereon, shall have been fully paid. The balance of any loan account under such direct reduction of principal method shall be determined monthly, quarterly or semiannually, in order to ascertain the amount then necessary to satisfy in full the mortgage obligation, and when so ascertained such amount shall be the amount due upon said loan at said time to said association or any representative or successor thereof. Any association permitting such method of repayment may adopt a plan by which the interest shall be computed periodically on the preceding balance, and such interest shall be added to that preceding balance, together with any and all advances and other charges above enumerated made for the benefit of the borrower during the said interest period, and then there shall be deducted from the total any and all payments made by the borrower to the association during said period, or since the preceding balance was set up.

All payments made on a loan under such plan of direct periodical reduction shall be applied first to interest, and then to the principal of advances made for the account of the borrower and charged thereto, and to the principal of the loan. The board of directors may adopt any other direct periodic reduction of principal plan that will require complete repayment of such loans: Provided, no plan of payment shall be adopted that will not mature and pay off the loan within a term to be fixed by the Commissioner of Insurance of North Carolina, which term shall not exceed 40 years from the date of the making thereof: Provided further, the board of directors may authorize the renewal or extension of the time of repayment of any loan theretofore made. Every person who has obtained or shall obtain a loan upon this or any other plan, or who has assumed or shall assume payment of a loan theretofore made upon this or any other plan or who shall be obligated upon any loan held by an association, shall be by reason thereof a member of the association making or holding such loan and shall be deemed a member until such loan is fully paid or assumed by another person or persons acceptable to the association. Such association may issue certificates of stock or membership to such member, but certificates shall not be necessary or required. (1937, c. 18; 1945, c. 189, s. 1; 1959, c. 367; 1971, c. 466.)

Editor's Note.—

The 1971 amendment substituted "a term to be fixed by the Commissioner of Insurance of North Carolina, which term shall

not exceed 40 years" for "twenty-five years" in the second sentence of the second paragraph.

§ 54-21.2. **Investments.**—(a) Any building and loan association or savings and loan association incorporated under the laws of this State is authorized to invest any funds on hand, in excess of the demands of its shareholders, in bonds or evidences of indebtedness of the United States government, or guaranteed by it; in bonds or other evidences of indebtedness of the State of North Carolina; in demand or time deposits with such bank or banks as may be approved by a majority of the board of directors; in stock of a federal home loan bank of which it is a

member and in any obligations or consolidated obligations of any federal home loan bank or banks; in stock or obligations of the Federal Savings and Loan Insurance Corporation; in stock or obligations of the National Mortgage Association or any successor or successors thereto; in savings accounts of any association operating under the provisions of this section, or in savings accounts of any federal savings and loan association having its principal office within the State, subject to the maximum amounts insured by any federal agency; in stock and obligations of any corporation doing business in North Carolina or of any agency of the State of North Carolina or of the United States where the principal business of such corporation or agency is to make loans for the financing of a college education and other educational loans, provided that each savings and loan association shall determine and be limited to an investment in such stock and obligations which shall not exceed a maximum of one percent (1%) of the total outstanding loans made by each such savings and loan association.

(b) Subject to such regulations and limitations as the Administrator of the Savings and Loan Division may prescribe, any such association is authorized and permitted to make any loan or investment now or hereafter permitted to be made by any federal savings and loan association by the Congress of the United States, federal home loan bank board and the Federal Savings and Loan Insurance Corporation.

(c) The rights and powers granted to associations by this section shall be deemed supplementary to and not in substitution for any rights and powers heretofore or hereafter granted such associations in their charters or by the laws of this State.

(d) Any savings and loan association incorporated under the laws of this State or any federal savings and loan association whose principal office is in the State of North Carolina, may invest in the capital stock, obligations, or other securities of any corporation organized under the laws of the State of North Carolina when the entire capital stock of such corporation is owned or is to be owned by such savings and loan association. Provided, however, that the original capital stock of such corporation shall aggregate at least three hundred thousand dollars (\$300,000.00) from subscriptions and payments by at least 10 of the aforementioned associations; and provided further that no association may own capital stock obligations or other securities of such corporation which in their aggregate exceeds one percent (1%) of the assets of each such savings and loan association, and provided further that not less than one hundred percent (100%) of all the activities of such service corporation shall consist of originating, purchasing, selling and servicing loans or participating interest in loans upon real estate or other investments authorized to be made by savings and loan associations doing business in the State of North Carolina, and performing such clerical, bookkeeping, accounting, statistical, and other such activities, as may be permitted by the Administrator of the Savings and Loan Division. (1945, c. 189, s. 4; 1959, c. 366; 1967, cc. 580, 653; 1971, c. 864, s. 17.)

Editor's Note.—

The first 1967 amendment added at the end of subsection (a) the provisions as to stock and obligations of corporations or State or federal agencies whose principal business is to make loans for the financing of a college education or other educational loans; in subsection (b) the amendment substituted "by the Congress of the United States, federal home loan bank board and

the Federal Savings and Loan Insurance Corporation" for "whose home office is located in this State."

The second 1967 amendment added subsection (d).

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" near the beginning of subsection (b) and at the end of subsection (d).

§ 54-21.4. Loans for improvements to real property; mobile home financing.—(a) Notwithstanding any other provisions of law, any building and loan association or savings and loan association incorporated under the laws of

this State or any federal savings and loan association having its principal office in North Carolina is authorized, without being required to take or receive any security, to make:

- (1) Any loan not exceeding seven thousand five hundred dollars (\$7,500) which is made for the improvement, alteration, repairing and equipping real property, subject to the rules and regulations governing such loans as adopted by the Administrator of the Savings and Loan Division; provided, however, that the combined total amount of the outstanding loans made under this section and the amount of the outstanding loans made on nonresidential real property as the term "nonresidential real property loan" is defined in the United States Code § 7701 (a) (19) shall not exceed nineteen percent (19%) of the total amount of the assets of any savings and loan association making loans under the provisions of this section.
- (2) Any loan for the purpose of purchasing or refinancing a mobile home, subject to the rules and regulations governing such loans as adopted by the Administrator of the Savings and Loan Division.

(b) The loans authorized to be made by savings and loan associations under the provisions of this section shall be subject to such regulations and limitations as the Administrator of the Savings and Loan Division shall prescribe. (1969, c. 737; 1971, c. 864, s. 17; 1973, c. 529.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" in subdivisions (1) and (2) of subsection (a) and in subsection (b).

The 1973 amendment, in subdivision (1) of subsection (a), substituted "seven thousand five hundred dollars (\$7,500)" for

"five thousand dollars (\$5,000.00)" near the beginning of the subdivision and "United States Code § 7701(a)(19)" for "United States Income Tax Regulations section 301.7701-13" and "assets" for "outstanding loans" near the end of the subdivision.

§ 54-22. Repayment at any time.—Any member of such association who shall borrow from it shall have the right at any time prior to the maturing of the shares pledged as collateral for such loan to pay off and discharge his loan by paying the amount received by him, including the cost and expenses of making the loan, if the same has been deducted therefrom, with interest at the rate agreed upon in the note to date of settlement, and all fines and dues then assessed and remaining unpaid. Upon such settlement he shall be credited with only the withdrawal value of his shares as fixed by the charter or bylaws, or by the directors of such association. In case of default by a shareholder who has borrowed from the association and a foreclosure of his mortgage or deed of trust, the amount of his indebtedness to such association shall be ascertained in the manner provided by this section. (1905, c. 435, s. 9; Rev., s. 3891; C. S., s. 5183; 1971, c. 487.)

Editor's Note. — The 1971 amendment, in the first sentence, substituted "agreed upon in the note to date of settlement" for

"of six per cent per annum on the whole sum received by him to the date of settlement" and inserted "assessed and."

ARTICLE 4.

Under Control of Administrator of the Savings and Loan Division.

§ 54-24. Power of Administrator of the Savings and Loan Division.—The Administrator of the Savings and Loan Division of the State is hereby empowered and directed to perform all the duties and exercise all the powers as to building and loan associations, unless herein otherwise provided. (1905, c. 435, s. 24; Rev., s. 3893; C. S., s. 5185; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner."

§ 54-24.1. Savings and Loan Commission. — (a) There shall be in the Department of Commerce a Savings and Loan Commission which shall consist of seven members. The Secretary of the Department of Commerce shall be ex officio a member of the Commission and serve as chairman of the Commission. The five members of the Savings and Loan Advisory Board, heretofore appointed by the Governor, shall continue as members of this Commission and shall serve their full terms and their successors shall be appointed in the same manner and for the same terms as was heretofore provided for members of the Savings and Loan Advisory Board. Upon July 14, 1971, and quadrennially thereafter, the Governor shall appoint a sixth member of the Commission whose term shall be for four years. At least three members of the Commission shall be persons who have had experience in management of savings and loan associations.

Meetings shall be held regularly as fixed by the bylaws but special meetings may be had at any time upon call of the chairman, or any three members of the Commission. Members of the Commission shall be reimbursed for expenses incurred in the performance of their duties under this section as prescribed in G.S. 138-5.

(b) The relationship between the Secretary of Commerce and the Savings and Loan Commission shall be as defined for a type II transfer under §§ 143A-1 to 143A-11.

(c) The Savings and Loan Commission is hereby vested with full power and authority to review, approve, or modify any action taken by the Administrator of the Savings and Loan Division in the exercise of all powers, duties, and functions vested in or exercised by the Administrator of the Savings and Loan Division under the savings and loan association laws of this State. (1967, c. 557; 1971, c. 864, s. 17.)

Editor's Note.—The 1971 amendment re-wrote this section.

State Government Reorganization.—The Savings and Loan Advisory Board [now Commission] was transferred to the Department of Commerce by § 143A-179, enacted by Session Laws 1971, c. 864.

The Savings and Loan Association Division was transferred to the Department of Commerce by § 143A-178, enacted by Session Laws 1971, c. 864.

§ 54-25. Annual license fees.—All domestic building and loan associations shall pay an annual license fee of twenty-five dollars (\$25.00) and may be licensed upon filing with the Administrator of the Savings and Loan Division an application in such form as he may prescribe. Such license fee shall be used to defray the expenses incurred by the Administrator of the Savings and Loan Division in supervising building and loan associations. (1919, c. 179, s. 1; C. S., s. 5186; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places in this section.

§ 54-26. Statement filed by association.—Every association doing business under this Subchapter shall file in the office of the Administrator of the Savings and Loan Division, on or before the first day of February in each year, in such form as he shall prescribe, a statement of the business standing and financial condition of the applicant on the preceding thirty-first day of December, signed and sworn to by the principal, or chief managing agent, attorney, or officer thereof, before the Administrator of the Savings and Loan Division, or before a commissioner of affidavits for North Carolina, or before some notary public. (1905, c. 435, s. 11; Rev., s. 3894; 1907, c. 959, s. 5; C. S., s. 5187; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places in this section.

§ 54-27. Statement examined, approved, and published; fees.—It shall be the duty of the Administrator of the Savings and Loan Division to receive and thoroughly examine each annual statement required by the Subchapter, and if

made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the State, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The Administrator of the Savings and Loan Division shall collect a fee of five dollars (\$5.00) from each association filing such statement, and the fees shall be paid into the State treasury to be credited to the general fund. (1905, c. 435, s. 12; Rev., s. 3895; C. S., s. 5188; 1945, c. 635; 1971, c. 864, s. 17.)

Editor's Note.—

The 1971 amendment substituted "Administrator of the Savings and Loan Division"

for "Insurance Commissioner" in the first sentence and for "Commissioner of Insurance" in the second sentence.

§ 54-28. License revoked.—If the Administrator of the Savings and Loan Division shall become satisfied at any time that any statements made by any association licensed under this Subchapter are untrue, or in case a general agent shall fail or refuse to obey the provisions of this Subchapter, or if upon examination the Administrator of the Savings and Loan Division is of opinion that such association or company is insolvent, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of business is not feasible for the purposes of carrying out successfully its plan, or that its condition is such as to render its further proceedings hazardous to the stockholders, he shall thereupon have power to revoke and cancel such license. (1905, c. 435, s. 13; Rev., s. 3896; 1907, c. 959, s. 6; C. S., s. 5189; 1971, c. 864, s. 17.)

Editor's Note.—The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places in this section.

§ 54-29. Examinations made; expense paid; test appraisals of collateral for loans.—If at any time the Administrator of the Savings and Loan Division has good reason to think that the standing and responsibility of any building and loan association or company doing business in this State, or its mode of business, is of a doubtful character, or in his discretion whenever he deems it prudent to do so, it shall be his duty to examine and investigate everything relating to the business of such company, and to that end he is hereby authorized, if he deem it advisable, to appoint a suitable and competent person to make such investigation, who shall file with the Administrator of the Savings and Loan Division a full report of his finding in such case. The expenses and cost of such examination shall be defrayed by the company or association subjected to investigation, and each company or association doing business in this State shall stipulate in writing, to be filed with the Administrator of the Savings and Loan Division, that it will pay all reasonable cost and expenses of such examination when it shall become necessary. The Administrator of the Savings and Loan Division whenever he deems it advisable, may direct the making of test appraisals of real estate and other collateral securing loans made by savings and loan associations doing business in this State, and where he deems advisable, employ competent appraisers, or prescribe a list from which competent appraisers may be selected, for the making of such appraisals by the Administrator of the Savings and Loan Division, or in a manner prescribed by the Administrator of the Savings and Loan Division, and do any and all other acts incident to the making of such test appraisals. The expense and cost of such test appraisals shall be defrayed by the company or association subjected to the test appraisals, and each company or association doing business in this State shall pay all reasonable costs and expenses of such test appraisals when it shall be directed. (1905, c. 435, ss. 14, 15; Rev., s. 3897; 1919, c. 179, s. 4; C. S., s. 5190; 1963, c. 353; 1971, c. 864, s. 17.)

Editor's Note.—

The 1971 amendment substituted "Administrator of the Savings and Loan Division"

for "Insurance Commissioner" throughout the section.

§ 54-30. Failing to exhibit books or making false statement a misdemeanor.—If any person, having in his possession or control any books, ac-

counts, or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the Administrator of the Savings and Loan Division, or his agents on demand, or shall knowingly or willfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned, at the discretion of the court. (1893, c. 434; 1899, c. 164; Rev., s. 3329; C. S., s. 5191; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner."

§ 54-31. Agent must obtain certificate.—It shall be unlawful for any person to solicit business or act as agent for any building and loan association or company without having procured from the Administrator of the Savings and Loan Division a certificate that such association or company for which he offers to act is duly licensed by the State to do business for the current year in which such person solicits business or offers to act as agent. The fee for such license shall be two dollars and fifty cents (\$2.50), to be paid to the Administrator of the Savings and Loan Division at the time the certificate is issued; and no other license or fee shall be required for said business of an agent or solicitor so licensed. (1895, c. 444, s. 3; 1899, c. 154, s. 2, subsec. 20; Rev., s. 3898; 1907, c. 959, s. 7; C. S., s. 5192; 1933, c. 17; 1971, c. 864, s. 17.)

Editor's Note.—

The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places in this section.

tion" for "Insurance Commissioner" in two places in this section.

§ 54-32. Penalties imposed and recovered. — Every general agent or attorney of any building and loan company or association who shall fail or refuse to perform any duty required of him by this Subchapter shall forfeit and pay to the Administrator of the Savings and Loan Division fifty dollars (\$50.00) for the State for every such refusal, to be recovered in the district court at the suit of the Administrator of the Savings and Loan Division. (1893, c. 434, s. 2300g; 1899, c. 154, s. 2, subsec. 20; Rev., s. 3899; C. S., s. 5193; 1971, c. 864, s. 17; 1973, c. 108, s. 18.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places.

The 1973 amendment substituted "in the district court" for "before any justice of the peace."

§ 54-33. Notice required before appointment of receivers. — No judge or court shall appoint a receiver for any building and loan association organized and incorporated under the laws of this State unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the Administrator of the Savings and Loan Division of the State. (1933, c. 38; 1971, c. 864, s. 17.)

Editor's Note.—

The 1971 amendment substituted "Ad-

ministrator of the Savings and Loan Division" for "Insurance Commissioner."

§ 54-33.1. Administrator of the Savings and Loan Division to prescribe books, records, etc.; retention, reproduction and disposition of records.—(a) Whenever in his judgment it may appear to be advisable, the Administrator of the Savings and Loan Division may issue such rules, instructions, and regulations prescribing the manner of preserving books, accounts, and records of associations as will tend to produce uniformity in the books, accounts, and records of associations of the same class.

(b) The following provisions shall be applicable to all building and loan associations and savings and loan associations operating under the provisions of this Subchapter:

- (1) Each association shall retain permanently the minute books of meetings of its stockholders and directors and all records which the Admin-

istrator of the Savings and Loan Division shall in accordance with the terms of this section require to be retained permanently.

- (2) All other association records shall be retained for such periods as the Administrator of the Savings and Loan Division shall in accordance with the terms of this section prescribe.
- (3) The Administrator of the Savings and Loan Division shall from time to time issue regulations classifying all records kept by associations and prescribing the period for which records of each class shall be retained. Such periods may be permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Administrator of the Savings and Loan Division shall consider:
 - a. Actions at law and administrative proceedings in which the production of association records might be necessary or desirable;
 - b. State and federal statutes of limitation applicable to such actions or proceedings;
 - c. The availability of information contained in association records from other sources;
 - d. Such other matters as the Administrator of the Savings and Loan Division shall deem pertinent in order that his regulations will require associations to retain their records for as short a period as is commensurate with the interest of association customers and stockholders and of the people of this State in having association records available.
- (4) Any association may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.
- (5) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.
- (6) Any association may dispose of any record which has been retained for the period prescribed by the Administrator of the Savings and Loan Division or in accordance with the terms of this section for retention of records for its class.

(c) The provisions of this section with reference to the retention and disposition of records shall apply to any federal savings and loan association operating in North Carolina unless in conflict with regulations prescribed by its supervisory authority. (1957, c. 1106; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment and Loan Division" for "Commissioner of substituted "Administrator of the Savings Insurance" throughout the section.

§ 54-33.2. Power of Administrator of the Savings and Loan Division to issue rules and regulations.—Whenever in his judgment it may appear to be advisable, the Administrator of the Savings and Loan Division of this State is empowered to issue such rules, instructions and regulations as may be necessary or incident to the proper discharge of his duties and powers as to savings and loan associations for the supervision and regulation of said associations and for the

protection of the public investing in said savings and loan associations. (1963, c. 1121; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner."

Cited in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

§ 54-33.3. Certain powers of federal savings and loan associations granted to State associations.—In addition to all the powers granted under this Subchapter, any savings and loan association incorporated under the laws of this State and operating under the provisions of this Subchapter is herein authorized to:

- (1) Invest in the capital stock, obligations or other securities of any service corporation organized under the laws of the State of North Carolina when the entire capital stock of such corporation is owned or is to be owned by one or more, but less than five, associations; but no association may make any investment in such corporation if its aggregate investment as determined by the Commissioner of Insurance of North Carolina would exceed one percent (1%) of its assets. Such service corporations shall be subject to audit by the Commissioner of Insurance of North Carolina, and the cost of such audit shall be borne by such corporation, and such corporation may engage in such activities which are approved as of the date of enactment of this section [June 21, 1971], by the Federal Home Loan Bank Board for service corporations for federal savings and loan associations whose principal office is in the State of North Carolina, provided that such activities are also approved by the Commissioner of Insurance of North Carolina.
- (2) Act as trustee of any trust created or organized in the United States and forming part of a stock bonus, pension or profit-sharing plan which qualifies or qualified for specific tax treatment under section 401 (d) of the Internal Revenue Code of 1954, as amended, if the funds of such trusts are invested only in savings accounts or deposits in such association or of obligations or securities issued by such association. All funds held in such fiduciary capacity by any such association may be commingled for appropriate purposes of investment, but individual records shall be kept by the fiduciary of each participant and shall show in proper detail all transactions engaged in under the authority of this section.
- (3) Negotiate dividend rates on an individual basis with members of such association. (1971, c. 632.)

ARTICLE 5.

Foreign Associations.

§ 54-35. Copy of charter and list of officers filed.—Application for authority to transact business in this State shall be made to the Administrator of the Savings and Loan Division, and on making such application every such association shall file with the Administrator of the Savings and Loan Division a duly authenticated copy of its charter or certificate of incorporation, its constitution and bylaws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the Administrator of the Savings and Loan Division, which shall be verified by oath of such officers and other persons as the Administrator of the Savings and Loan Division shall designate, and the Administrator of the Savings and Loan Division shall furnish

blank forms for the report required, and may call for additional reports at such other times as may seem to him expedient. (1905, c. 435, s. 19; Rev., s. 3902; C. S., s. 5195; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" and "Commissioner" throughout the section.

§ 54-36. License granted.—If it shall appear to the Administrator of the Savings and Loan Division by the report aforesaid and by an examination of the affairs of such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the laws governing building and loan associations of this State, it may be admitted to transact business in this State upon a certificate of authority to be issued by the Administrator of the Savings and Loan Division, which shall only be issued when such association shall have complied with the further requirements of this Article. (1905, c. 435, s. 20; Rev., s. 3903; C. S., c. 5196; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places in this section.

§ 54-37. Securities deposited.—The Administrator of the Savings and Loan Division before issuing the certificate of authority aforesaid shall require every such association to deposit with the Administrator of the Savings and Loan Division such securities as he may approve, amounting to at least thirty thousand dollars (\$30,000), which securities shall be held by him in trust for the exclusive benefit and security of the creditors and shareholders of such association resident in this State, and he shall have authority to require it to deposit additional securities and to order a change in any of the securities so deposited at any time, and no change or transfer of the same shall be made or be effectual without his consent. Such deposit shall be maintained intact in the full sum required at all times, but the association making such deposit, so long as it shall continue solvent and comply with all the provisions of this Subchapter applicable to it, may receive the dividends or interest on the securities deposited, and may from time to time, with the assent of the Administrator of the Savings and Loan Division, withdraw any of such securities on depositing with the Administrator of the Savings and Loan Division other like securities the par value of which shall be equal to such as may be withdrawn. (1905, c. 435, s. 21; Rev., s. 3904; C. S., s. 5197; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" and "Commissioner" throughout the section.

§ 54-38. Annual certificate; service of process. — Such certificate of authority shall be for the current year only, and shall not be issued until such association shall, by a duly executed instrument filed with the Administrator of the Savings and Loan Division of the State, constitute the Administrator of the Savings and Loan Division and his successors in office its true and lawful attorney, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the Administrator of the Savings and Loan Division shall be of the same force and validity as if served on the association, and that the authority thereof shall continue in force irrevocable so long as any liability of the association remains outstanding in this State. The service of such process shall be made by leaving a copy of the same in the office of the Administrator of the Savings and Loan Division, with a fee of two dollars (\$2.00), to be taxed in the plaintiff's costs. When any original process is thus served, the Administrator of the Savings and Loan Division, by letter directed to the secretary, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The Administrator of the Savings and Loan Division shall keep a record of all such process,

showing the day and hour of service. (1905, c. 435, s. 23; Rev., s. 396; C. S., s. 5198; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" and "Commissioner" throughout the section.

§ 54-39. Agent must have certificate of license; fees.—It shall be unlawful for any person to solicit business or act as agent for any foreign building and loan association or company doing business in this State without having first procured from the Administrator of the Savings and Loan Division a certificate that such association or company for which he offers to act is duly licensed by the State to do business for the current year in which such person solicits business or offers to act as agent. The Administrator of the Savings and Loan Division shall be entitled to a fee of one dollar (\$1.00) for issuing each such certificate, to be paid by the company for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1895, c. 444, s. 3; 1905, c. 435, s. 18; Rev., ss. 3327, 3901; C. S., s. 5199; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner" in two places in this section.

§ 54-40. Fees and expenses.—Every such association shall pay for filing a certified copy of its charter or certificate of incorporation twenty dollars (\$20.00); for filing original annual reports, twenty dollars (\$20.00); for certificate of authority, annually, two hundred and fifty dollars (\$250.00); for certificate for each agency, five dollars (\$5.00); and shall defray all expenses incurred in making any examination of its affairs as herein provided for; and the Administrator of the Savings and Loan Division may maintain an action in the name of the State against such association for the recovery of such expenses in any court of competent jurisdiction. (1905, c. 435, s. 22; Rev., s. 3905; C. S., s. 5200; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Insurance Commissioner."

ARTICLE 5A.

Reserves.

§ 54-41.1. Required reserves for losses; profits not otherwise apportioned.—The gross earnings of every building and loan association or savings and loan association shall be ascertained at least semiannually. Before any such association shall apportion profits or declare dividends, the board of directors shall first deduct from the earnings a sufficient sum of money to meet the operating expenses of such association, all of which expenses shall be paid from earnings. The directors, after providing for the operating expenses, shall then transfer to a reserve fund which shall at all times be available to meet losses arising from any source whatsoever not less than five percent (5%) of the net earnings since the last apportionment of profits or declaration of dividends until such reserve for losses is at least five percent (5%) of the outstanding shares of the association; and thereafter, if at any time such reserve for losses shall become less than five percent (5%) of the outstanding shares of the association, then at least five percent (5%) of the net earnings shall be transferred thereto before the apportionment of any profits or the declaration of any dividends until said reserve fund is restored to five percent (5%) of the outstanding shares of the association. The reserve fund herein provided is to be considered identical with, and not supplemental to the reserves required to be set up by an association insured by the Federal Savings and Loan Insurance Corporation.

Any profits not otherwise apportioned or set apart by the directors of the association shall be paid to or credited to the accounts of the shareholders semi-

annually in conformity with the bylaws of the association. (1959, c. 1126; 1971, c. 886, ss. 1, 2.)

Editor's Note. — The 1971 amendment lowering “not less than,” and “five percent (5%)” for “ten percent (10%)” following “then at least.”

ARTICLE 7A.

Mutual Deposit Guaranty Associations.

§ 54-44.1. **Definitions.**—As used in this article,

- (1) “Commissioner” means Commissioner of Insurance of North Carolina.
- (2) “Guaranty association” means a mutual deposit guaranty association organized pursuant to this article.
- (3) “Institution” means a building and loan association, a savings and loan association or a credit union organized pursuant to article 1 of subchapter 1 and article 10, subchapter III of this chapter. (1967, c. 1091.)

§ 54-44.2. **Organization of a mutual deposit guaranty association.**—Any number of institutions, not less than 10, may become incorporated as a mutual deposit guaranty association without capital stock subject to the limitations prescribed in this article.

Articles of incorporation of a guaranty association shall be filed in the office of the Secretary of State. The Secretary of State shall, upon receipt of such articles, transmit a copy of them to the Commissioner and shall not record them until authorized to do so by the Commissioner. (1967, c. 1091.)

§ 54-44.3. **Examination and certificate by Commissioner.** — Upon receipt from the Secretary of State of a copy of the articles of incorporation of a proposed guaranty association, the Commissioner shall at once examine into all the facts connected with the formation of such proposed corporation. In the event such articles of incorporation are correct in form and substance and the examination shows that such corporation, if formed, would be entitled to commence the business of a guaranty association, the Commissioner shall so certify to the Secretary of State.

The Commissioner may refuse to make such certification if upon examination he has reason to believe the proposed corporation is to be formed for any business other than assuring the liquidity of member institutions and guaranteeing deposits therein, if he has reason to believe that the character and general fitness of the incorporators are not such as to command the confidence of the general public or if the best interests of the public will not be promoted by its establishment. (1967, c. 1091.)

§ 54-44.4. **Recording of articles of incorporation; certified copies.**—Upon receipt of the certificate provided for in § 54-44.3, the Secretary of State shall record the articles of incorporation of such guaranty association and furnish a certified copy thereof to the incorporators and to the Commissioner. Upon such recordation, such association shall be deemed a corporation. All papers thereafter filed in the office of the Secretary of State relating to such corporation shall be recorded as provided by law and a certified copy forwarded to the Commissioner (1967, c. 1091.)

§ 54-44.5. **Proposed amendments transmitted to Commissioner.**—When any proposed amendments to the articles of incorporation of a guaranty association are filed in the office of the Secretary of State, the Secretary of State shall transmit a copy thereof to the Commissioner and shall not record such amendments until authorized to do so by the Commissioner. (1967, c. 1091.)

§ 54-44.6. **Examination and certificate of amendments.**— Upon receipt from the Secretary of State of a copy of proposed amendments to the articles of incorporation of a guaranty association, the Commissioner shall at once examine the proposed amendments to determine their effect on the operation of the guaranty association.

In the event such proposed amendments are correct in form and substance and the examination shows that if adopted they would not change the character or principal business of the guaranty association, the Commissioner shall so certify to the Secretary of State.

The Commissioner may refuse to make such certification if upon examination he has reason to believe the proposed amendments would change the character of the business of the guaranty association or the best interests of the public will not be promoted by their adoption. (1967, c. 1091.)

§ 54-44.7. **Recording of amendments; certified copies.**— Upon receipt of the certificate provided for in G.S. 54-44.6, the Secretary of State shall record the amendments to the articles of incorporation and furnish a certified copy thereof to the corporation and to the Commissioner. (1967, c. 1091.)

§ 54-44.8. **Powers of associations.**— A guaranty association incorporated in accordance with the provisions of this article may:

- (1) Assure the liquidity of a member institution;
- (2) Guarantee the free shares or deposits in a member institution;
- (3) Loan money to a member institution for the purpose of assuring its liquidity and deposits therein;
- (4) Buy any assets owned by a member institution for the purpose of assuring its liquidity and deposits therein;
- (5) Invest any of its funds in:
 - a. Bonds or interest-bearing obligations of the United States or for which the faith and credit of the United States are pledged for the payment of principal and interest;
 - b. Bonds or interest-bearing obligations of this State;
 - c. Farm loan bonds issued under the "Federal Farm Loan Act" and amendments thereto;
 - d. Notes, debentures, and bonds of the federal home loan bank issued under the "Federal Home Loan Bank Act" and any amendments thereto;
 - e. Bonds or other securities issued under the "Home Owners Loan Act of 1933" and any amendments thereto;
 - f. Securities acceptable to the United States to secure government deposits in national banks;
 - g. Certificates of deposit of any financial institution that is subject to examination and supervision by the United States or by this State.
 - h. Bonds or other evidences of indebtedness of counties and municipalities of the State of North Carolina; provided, that said bonds or other evidences of indebtedness of such counties and municipalities shall have a rating by Moody's Investors Services, Inc., of not less than AA, and a rating by the North Carolina Municipal Council, Inc., of not less than ninety (90) points out of one hundred (100) points.
- (6) Issue its capital notes or debentures to member institutions, provided the holders of such capital notes or debentures shall not be individually responsible as such holders for any debts, contracts, or engagements of the guaranty association issuing such notes or debentures;
- (7) Borrow money;

- (8) Exercise any corporate power or powers not inconsistent with, and which may be necessary or convenient to, the accomplishment of its purposes of assuring liquidity of member institutions and guaranteeing deposits therein. (1967, c. 1091; 1969, c. 816.)

Editor's Note. — The 1969 amendment added paragraph h of subdivision (5).

§ 54-44.9. **Filing of semiannual financial reports.**—Each guaranty association shall on the thirtieth day of June and the thirty-first day of December of each year, or within 40 days thereafter, file with the Commissioner a report for the preceding half year, showing its financial condition at the end thereof.

Such reports shall be in such form and contain such information as may be prescribed by the Commissioner. (1967, c. 1091.)

§ 54-44.10. **Annual examination of associations.** — At least once each year the Commissioner shall make or cause to be made an examination into the affairs of each guaranty association doing business in this State. The expenses of such yearly examination shall be paid by the association so examined. (1967, c. 1091.)

§ 54-44.11. **Special examinations.**—Whenever the Commissioner deems it necessary he may make or cause to be made a special examination of any guaranty association doing business in this State in addition to the regular examination provided for by this article. The expense of a special examination shall be paid by the guaranty association so examined. (1967, c. 1091.)

§ 54-44.12. **Right to enter and conduct investigations.** — The Commissioner or any examiner appointed by him shall have access to and may compel the production of all books, papers, securities, moneys, and other property of a guaranty association under examination by him. He may administer oaths to and examine the officers and agents of such association as to its affairs. (1967, c. 1091.)

§ 54-44.13. **Fees.**—Each guaranty association doing business in this State shall pay to the Commissioner, at the time of filing each semiannual report required by this article, the sum of five dollars (\$5.00). All such fees shall be paid into the State treasury to the credit of the general fund. (1967, c. 1091.)

SUBCHAPTER III CREDIT UNIONS.

ARTICLE 9.

Credit Union Division; Administrator of Credit Unions.

§ 54-74. **Creation and supervision of division.**—There shall be established in the North Carolina Department of Commerce a credit union division, which shall be under the supervision of Administrator of Credit Unions appointed by the Secretary of Commerce. The credit union division and the Administrator of Credit Unions shall be under the general direction and supervision of the Secretary of Commerce, and there shall be such assistants to the Administrator of Credit Unions as may be necessary and the salaries of the Administrator and assistants shall be fixed by the State Personnel Council. (1915, c. 115, s. 1; C. S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87; 1965, c. 956, s. 1; 1971, c. 864, s. 17.)

Editor's Note.—

The 1965 amendment rewrote this section. The amendatory act provides that wherever the word "superintendent" appears in this Subchapter it is deleted and the word "Administrator" inserted in lieu thereof.

The 1971 amendment substituted "De-

partment of Commerce" for "Department of Agriculture," and "Secretary of Commerce" for "Commissioner of Agriculture" in two places, in the first paragraph.

State Government Reorganization.—The Credit Union Division was transferred to the Department of Commerce by § 143A-180, enacted by Session Laws 1971, c. 864.

§ 54-75. Duties of Administrator.—The duties of the Administrator of Credit Unions shall be as follows:

- (1) To organize and conduct in the State Department of Commerce, a bureau of information in regard to cooperative associations and rural and industrial credits.
- (2) Upon the application of three persons residing in the State of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.
- (3) To maintain an educational campaign in the State looking to the promotion and organization of credit unions. Upon the written request of twelve bona fide residents of any particular locality in this State expressing a desire to form a local credit union at or in such locality, the Administrator of Credit Unions, or one of his assistants, shall proceed as promptly as may be convenient to such locality and make an investigation in order that the Administrator may determine whether or not a local credit union should be established according to the standards set forth and provided in this subchapter. The Administrator shall notify the applicants of his decision within thirty days after receipt of the written request. Before refusing the establishment of a credit union the Administrator shall afford the applicants an opportunity to be heard therewith in person or by counsel and at least sixty days prior to the date set for a hearing on any such matter shall notify in writing the applicants of the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in article 33 of chapter 143 of the General Statutes of North Carolina, as amended.
- (4) To examine at least once a year, and oftener if such examination be deemed necessary by the Administrator or his assistant, the credit unions formed under this Subchapter. A report of such examination shall be filed with the State Department of Commerce, and a copy mailed to the credit union at its proper address.
- (5) The Administrator of Credit Unions is authorized, empowered, and directed to fix the amount of a blanket surety bond which shall be required of each credit union official, committee member and employee, irrespective of whether such official, committee member and employee receives, pays or has custody of money or other personal property owned by a credit union or in the custody or control of the credit union as collateral or otherwise. The surety on the bond shall be a surety company authorized to do business in North Carolina. Any such bond or bonds shall be in a form approved by the Administrator of Credit Unions with a view to providing surety coverage to the credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction or misapplication on the part of the person, directly or through connivance with others, and such other surety coverages as the Administrator of Credit Unions may determine to be reasonably appropriate or as elsewhere required by the chapter. Any such bond or bonds shall be in an amount in relation to the money or other personal property involved or in relation to the assets of the credit union as the Administrator may from time to time prescribe by regulation for the purpose of requiring reasonable coverage. The Administrator may also approve the use of a form of excess coverage bond whereby a credit union may obtain an amount of coverage in excess of the basic surety coverage. No

agreement, compromise or settlement of any claim or claims filed by a credit union with any surety or any surety company, for less than the full amount of said claim or claims, shall be entered into or made by the board of directors of any credit union unless and until the said claim or claims shall have been submitted to the Administrator of Credit Unions and his advice thereon given or transmitted to the board of directors of said credit union.

The following schedule shall be deemed as the minimum fidelity and faithful performance bond requirements only:

<i>Assets</i>	<i>Minimum Coverage</i>
\$ 0,000 to \$ 5,000	\$ 1,000
5,001 to 10,000	2,000
10,001 to 20,000	4,000
20,001 to 30,000	6,000
30,001 to 40,000	8,000
40,001 to 50,000	10,000
50,001 to 75,000	15,000
75,001 to 100,000	20,000
100,001 to 200,000	30,000
200,001 to 300,000	40,000
300,001 to 400,000	50,000
400,001 to 500,000	70,000
500,001 to 750,000	85,000
750,001 to 1,000,000	100,000

Over \$1,000,000 minimum amount, \$100,000 plus \$50,000 for each additional million or fraction thereof of assets.

It shall be the duty of the board of directors of each credit union to provide proper protection to meet any circumstances by obtaining adequate bond (an insurance) coverage in excess of the above minimum schedule. The treasurer and all other persons handling credit union funds or records before entering upon his or their duties shall give a proper bond with good and sufficient surety, in an amount and character to be determined by the board in compliance with regulations conditioned upon the faithful performance of his or their trust.

The Administrator may require additional coverage for any credit union when, in his opinion, the surety bonds in force are insufficient to provide adequate surety coverage, and it shall be the duty of the board of directors of any credit union to obtain such additional coverage within 60 days after the date of written notice by the Administrator to such board of directors. For good cause shown the Administrator may extend the time to obtain additional coverage. (1915, c. 115, s. 1; C. S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; 1957, c. 989, s. 1; 1965, c. 956, ss. 1-3; 1971, c. 864, s. 17; 1973, c. 199, ss. 1-3.)

Editor's Note.—

The 1965 amendment substituted "Administrator" for "Superintendent" throughout this section, and rewrote subdivision (3). It also added the schedule and subsequent paragraphs to subdivision (5).

The 1971 amendment substituted "Commerce" for "Agriculture" in subdivision (1) and in the second sentence of subdivision (4).

The 1973 amendment, in subdivision (5), rewrote the former first sentence as the present first and second sentences of the first paragraph, eliminated a former fourth sentence in the first paragraph, relating to blanket bonds covering all boards, committee members and employees of a credit union, and substituted "200,000" for "150,000" under "Assets" in the schedule in the second paragraph.

§ 54-75.1. Preservation of books, accounts and records; retention of minute books of meetings; classification of records; reproduction shall be deemed to be an original record.—(a) Whenever in his judgment it may appear to be advisable, the Administrator of the Credit Union Division may issue such rules, instructions, and regulations prescribing the manner of preserving books, accounts, and records of associations as will tend to produce uniformity in the books, accounts, and records of associations of the same class.

(b) The following provisions shall be applicable to all credit unions operating under the provisions of this Subchapter :

- (1) Each credit union shall retain permanently the minute books of meetings of its members and directors and all records which the Administrator of the Credit Union Division shall in accordance with the terms of this section require to be retained permanently.
- (2) All other credit union records shall be retained for such periods as the Administrator of the Credit Union Division shall in accordance with the terms of this section prescribe.
- (3) The Administrator of the Credit Union Division shall from time to time issue regulations classifying all records kept by credit unions and prescribing the period for which records of each class shall be retained. Such periods may be permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Administrator of the Credit Union Division shall consider :
 - a. Actions at law and administrative proceedings in which the production of credit union records might be necessary or desirable ;
 - b. State and federal statutes of limitation applicable to such actions or proceedings ;
 - c. The availability of information contained in credit union records from other sources ;
 - d. Such other matters as the Administrator of the Credit Union Division shall deem pertinent in order that his regulations will require credit unions to retain their records for as short a period as is commensurate with the interest of credit union members and of the people of this State in having credit union records available.
- (4) Any credit union may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.
- (5) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.
- (6) Any credit union may dispose of any record which has been retained for the period prescribed by the Administrator of the Credit Union Division or in accordance with the terms of this section for retention of records for its class. (1973, c. 98, s. 1.)

Editor's Note. — Session Laws 1973, c. 98, s. 2, makes the act effective July 1, 1973.

ARTICLE 10.

Incorporation of Credit Unions.

§ 54-76. **Applications filed.**—Twelve or more persons employed or residing in the State may become a credit union by making, signing, and acknowledging a certificate which shall contain :

- (1) The name of the proposed credit union which shall include the words "credit union."
- (2) A statement that incorporation is desired under this article.
- (3) The conditions, whether of residence, of occupation, or otherwise, which shall qualify persons for membership.
- (4) The par value of the shares, which shall not exceed twenty-five dollars.
- (5) The city, village, or town in which its principal business office is to be located. If it is to be located in an incorporated city, the street address of the city shall be given. If the condition of its membership is employment by a certain individual, copartnership, or corporation, a statement that its office shall be with such individual, copartnership, or corporation may be substituted for the street address.
- (6) The number of its directors, not less than five, all of whom must be members of and shareholders in the corporation.
- (7) The names and post-office addresses of the directors for the first year.
- (8) The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation. (1915, c. 115, s. 2; C. S., s. 5210; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 4.)

Editor's Note. — The 1965 amendment substituted "Twelve" for "Seven" at the beginning of this section.

§ 54-78. **Certificate of incorporation.**—The bylaws acknowledged to have been adopted by all of the incorporators, together with the certificate of incorporation, shall be filed in the office of the Administrator of Credit Unions who shall approve the certificate of incorporation if he is satisfied that :

- (1) The certificate of incorporation and bylaws are in conformity with this subchapter ;
- (2) The general character and fitness of the subscribers or incorporators, and their ability to provide proper business and financial records and conduct sound financial operations is reasonably probable ;
- (3) The bylaws are reasonable and will tend to give assurance that the affairs of the prospective credit union will be administered in accord with this subchapter ;
- (4) The economic advisability and that convenience and necessity require a credit union in the locality.

Thereupon, the Administrator of Credit Unions shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the bylaws, which certificate of approval, together with the attached duplicate certificate of incorporation, shall be recorded in the office of the register of deeds of the county in which the office of such credit union is situated, and upon recordation of the incorporators shall become and be a corporation for the purposes set forth in this subchapter. The register of deeds of the county in which such recordation is made shall charge the same fee for such recordation as he is now allowed to charge for handling and recording a certificate of incorporation of a corporation organized under the business corporation laws of the State. (1915, c.

115, s. 2; C. S., s. 5212; 1925, c. 73, s. 3; 1935, s. 87; 1965, c. 956, s. 5; 1967, c. 823, s. 9.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1965 amendment rewrote this section.

The 1967 amendment, effective Jan. 1,

1968, substituted "register of deeds" for "clerk of superior court" and "clerk of the superior court" in two places in this section.

§ 54-79. Amendment of bylaws.—The bylaws adopted by the incorporators and approved by the Administrator of Credit Unions shall be the bylaws of the corporation, and no amendment to the bylaws shall become operative until such amendment shall have been approved and filed by the Administrator of Credit Unions; and a copy thereof certified by him, with a certificate of his approval, shall be filed with the credit union. Such approval may be given or withheld by the Administrator of Credit Unions, at his discretion. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in article 33 of chapter 143 of the General Statutes of North Carolina as amended. (1915, c. 115, s. 3; C. S., s. 5213; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 6.)

Editor's Note. — The 1965 amendment rewrote this section.

§ 54-81. Change of place of business.—A credit union may change its place of business on the written approval of the Administrator of Credit Unions upon filing with the Administrator of Credit Unions a written application or request setting forth all details of such proposed change, and setting forth the location, building, office, and proper address of such proposed change or new location. If the Administrator of Credit Unions shall approve such change of place of business, then he shall record such approval in his office, and a duplicate of such approval shall be recorded in the office of the register of deeds where its office was located, and a second duplicate in the office of the register of deeds of the county in which the new office is to be located, if same is changed to another county. If the change is from one location to another in the same county, then the recordation shall be in said county. Before refusing any change in location the Administrator shall afford the credit union an opportunity to be heard in connection therewith in person or by counsel and at least thirty days prior to the date set for a hearing on any such matter shall notify in writing the credit union the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in article 33 of chapter 143 of the General Statutes of North Carolina, as amended. (1915, c. 115, s. 25; C. S., s. 5215; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 7; 1967, c. 823, s. 10.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1965 amendment rewrote this section.

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in two places in the second sentence.

ARTICLE 11.

Powers of Credit Unions.

§ 54-84. Borrowing money.—If the bylaws so provide, a credit union shall have power to borrow money in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than the

total sum of its capital, surplus, and reserve fund. (1915, c. 115, s. 17; C. S., s. 5218; 1925, c. 73, s. 10; 1935, c. 87; 1965, c. 956, s. 8.)

Editor's Note. — The 1965 amendment added "addition," and substituted "the total sum" deleted "from any source" formerly appearing between "borrow money" and "in for "four (4) times the sum."

§ 54-85. Authority to execute contracts of guaranty in certain cases.—A credit union may execute such contracts of guaranty as may be necessary to procure credit for its members: Provided, that the said contracts of guaranty shall not place on the said local credit union a liability arising in any one year in excess of ten (10) per cent of the total credit under the said contracts of guaranty handled through that association in a particular year; and provided further, that all such contracts shall be approved by the Administrator of Credit Unions and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said credit union may require of the individual members being served such security as the board of directors of each such credit union may determine upon. (1925, c. 73, s. 11; 1935, c. 87; 1965, c. 956, s. 1.)

Editor's Note. — The 1965 amendment substituted "Administrator of Credit Unions" for "Superintendent of Credit Unions" near the end of the first sentence.

§ 54-85.1. Conversion from State to federal credit union and from federal to State credit union.—(a) A State credit union may be converted into a federal credit union under the laws of the Federal Credit Union Act.

- (1) The proposition for such conversion shall be approved, and a date set for a vote thereon by the members (either at a meeting to be held on such date or by written ballot to be filed on or before such date), by a majority of the directors of the State credit union. Written notice of the proposition and of the date set for the vote shall then be delivered in person to each member, or mailed to each member at the address for such person appearing on the records of the credit union, not more than thirty nor less than seven days prior to such date. Approval of the proposition for conversion shall be by the affirmative vote of a majority of the members, in person or in writing.
 - (2) A statement of the results of the vote, verified by the affidavits of the president or vice president and the secretary, shall be filed with the State credit union division within ten days after the vote is taken.
 - (3) Promptly after the vote is taken and in no event later than ninety days thereafter, if the proposition for conversion was approved by such vote, the credit union shall take such action as may be necessary under the Federal Credit Union Act to make it a federal credit union, and within ten days after receipt of the federal credit union charter there shall be filed with the State credit union division a copy of the charter thus issued. Upon such filing the credit union shall cease to be a State credit union.
 - (4) Upon ceasing to be a State credit union such credit union shall no longer be subject to any of the provisions of the North Carolina Credit Union Act. The successor federal credit union shall be vested with all of the assets and shall continue responsible for all of the obligations of the State credit union to the same extent as though the conversion had not taken place.
- (b) (1) A federal credit union organized under the laws of the United States, may be converted into a State credit union (i) complying with all federal credit union requirements requisite to enabling it to convert to a State credit union or to cease being a federal credit union, (ii) filing with the State credit union division proof of such compliance, satisfactory to the Administrator of Credit Unions and (iii) filing

with the State credit union division an organization certificate as required by the State Credit Union Act.

- (2) When the Administrator of the State credit union division has been satisfied that all of such requirements, and all other requirements of the State Act, have been complied with, the Administrator of the credit union division shall approve the organization certificate. Upon such approval, the federal credit union shall become a State credit union as of the date it ceases to be a federal credit union. The State credit union shall be vested with all of the assets and shall continue responsible for all of the obligations of the federal credit union to the same extent as though the conversion had not taken place. (1965, c. 956, s. 9.)

§ 54-86. Investment of funds.—The capital, deposits, undivided profits and reserve fund of the corporation may be invested in any of the following ways, and in such ways only:

- (1) They may be lent to the members of the corporation in accordance with the provisions of this Chapter.
- (2) In capital shares, obligations, or preferred stock issues of any agency or association organized either as a stock company, mutual association, or membership corporation, provided the membership or stockholdings, as the case may be, of such agency or association are confined or restricted to credit unions or organizations of credit unions, and provided the purposes for which such agency or association is organized or designed to service or otherwise assist credit union operations.
- (3) In obligations of the State of North Carolina or any subdivision thereof.
- (4) In obligations of the United States, including bonds and securities upon which payment of principal and interest is fully guaranteed by the United States.
- (5) They may be deposited to the credit of the corporation in savings banks, credit unions, savings and loan associations, State banks or trust companies incorporated under the laws of the State, or in national banks located therein.
- (6) In loans to other credit unions in an amount not to exceed twenty-five percent (25%) of the shares and unimpaired surplus of the lending credit union.
- (7) In an aggregate amount not to exceed twenty-five percent (25%) of the allocations to the reserve fund in any agency or association of the type described in subdivision (2) hereof, provided the purposes of any such agency or association are designed to assist in establishing and maintaining liquidity, solvency, and security in credit union operations.
- (8) In the North Carolina Mutual Deposit Guaranty Association.
- (9) Guaranteed Debentures and Real Estate Investment Trusts.—A credit union shall keep on deposit at interest in any such depositories as are enumerated in subdivisions (2), (4), and (5) of this section, so much of the reserve fund and capital stock as shall equal five percent (5%) of the total shares and deposits. The said five percent (5%) representing said deposit shall not be encumbered or in any manner pledged, hypothecated, used as collateral or in any manner used as security for a loan.
- (10) They may be placed on time deposits in any banks insured by the Federal Deposit Insurance Corporation or may be deposited or may be invested in any savings or building and loan association insured by the Federal Savings and Loan Insurance Corporation. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C. S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781; 1965, c. 956, ss. 10, 11; 1969, c. 69, s. 1; 1973, c. 199, s. 4.)

Editor's Note.—

The 1965 amendment substituted "any" for "one" and "ways" for "way" in the introductory language of this section, added the last sentence in subdivision (3), substituted "twenty-five (25)" for "ten (10)" near the beginning of subdivision (4), and added subdivisions (5) and (6).

The 1969 amendment added subdivision (7).

The 1973 amendment rewrote this section.

Credit Unions May Invest in Government Securities Program.—See opinion of Attorney General to Mr. W.V. Didawick, Administrator, Credit Union Division, Department of Agriculture, 40 N.C.A.G. 50 (1970).

§ 54-87. **Loans.**—(a) To members.—A credit union may lend to its members for such purposes and upon such security and terms as the bylaws provide and the credit committee or loan officer shall approve; provided, however, the maximum amount of any secured or unsecured loan shall be based on the amount of the unimpaired capital and surplus of the lending credit union according to the following table:

Unimpaired Capital and Surplus	Unsecured Limit	Secured Limit
\$ 1,000	\$ 200	\$ 200
2,000	200	200
3,000	200	300
4,000	200	400
5,000	200	500
6,000	200	600
7,000	200	700
8,000	200	800
9,000	225	900
10,000	250	1,000
20,000	500	2,000
30,000	750	3,000
40,000	1,000	4,000
50,000	1,250	5,000
60,000	1,500	6,000
70,000	1,750	7,000
80,000	2,000	8,000
90,000	2,250	9,000
100,000	2,500	10,000
More than 100,000	2,500	10% of Unimpaired Capital and Surplus

An endorsed note shall be deemed to be security within the meaning of this section. Irrespective of the foregoing table, a member of a credit union may be permitted to borrow up to the full amount of his shares.

(b) **Loans to Members of Committee.**—The supervisory committee or board of directors shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the credit union or becomes surety for any other member whose application for a loan is under consideration.

(c) **Loans to Persons Not Members Forbidden.**—All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a credit union to persons not members shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be imprisoned not more than two years or fined not in excess of ten thousand dollars (\$10,000.00), or both such fine and imprisonment. The credit union shall have the right to recover the amount

of such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof, or from all of them jointly.

(d) Repayment of Loans.—A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 232, s. 4; C. S., s. 5220; 1925, c. 73, s. 3; 1935, c. 87; 1955, c. 1135, s. 2; 1961, c. 1187, s. 1; 1965, c. 956, ss. 1, 12, 13; 1969, c. 69, s. 9; 1973, c. 199, s. 5.)

Editor's Note.—

The 1965 amendment substituted "Administrator" for "Superintendent" in subsection (a), deleted former subsection (b), redesignated former subsection (c) as present subsection (b), rewrote former subsection (d) and redesignated it as present subsection (c), and redesignated former subsection (e) as present subsection (d).

The 1969 amendment substituted "fifteen hundred dollars (\$1500.00)" for "seven hundred fifty dollars (\$750.00)" in the first sentence of subsection (a).

The 1973 amendment rewrote subsection (a) and inserted "or board of directors" in subsection (b).

§ 54-87.1. Money orders; nonnegotiable sight drafts; travelers' checks.—In addition to the powers now authorized by this Article, credit unions organized under this Subchapter are hereby authorized to make money orders, nonnegotiable sight drafts and travelers' checks available to their members as their bylaws may provide. (1973, c. 199, s. 13.)

§ 54-88. Rate of interest; authority to deduct interest.—No corporation organized pursuant to this Subchapter shall directly or indirectly charge or receive any interest or discount in excess of one percent (1%) per month on the unpaid principal of loans except a minimum charge not to exceed fifty cents (50¢) may be made for any loan. The terms "interest" and "discount" as used in this section shall not be deemed to include charges made by a credit union for appraisals of real or personal property; attorneys' fees for searching title to real property, preparing notes, deeds of trust, mortgages and closing loans; and recording fees. Rate of interest and terms of repayment shall appear on each note but the corporation may, for the purpose of making loans, discount and negotiate promissory notes and deduct in advance, from the proceeds of such loan, interest at a rate not to exceed the rate herein fixed, which shall be the legal rate for corporations organized under this Subchapter, and such deductions shall be made upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in such installments. (1915, c. 115, s. 20; C. S., s. 5221; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 2; 1973, c. 199, s. 6.)

Editor's Note.—

The 1973 amendment substituted "or discount" for "discount or consideration, other than the entrance fee," near the beginning of the first sentence, added "except a minimum charge not to exceed fifty cents (50¢) may be made for any loan" at the end of the first sentence and added the second sentence.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Opinions of Attorney General. — Mr. W.V. Didawick, Administrator of Credit Unions, Department of Agriculture, 40 N.C.A.G. 49 (1969).

§ 54-89. Ownership and leasing of real estate.—Any credit union may purchase and hold a lot and building to be used principally for the transaction of credit union business, by first obtaining written approval from the Administrator of Credit Unions. Provisions may be made for future expansion; and any excess space which is not occupied by the credit union may be leased to the public. (1927, c. 101; 1929, c. 43, s. 1; 1931, c. 329; 1965, c. 956, s. 14.)

Editor's Note. — The 1965 amendment rewrote this section, which formerly pertained to interest or discount rate charged by agricultural association.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 54-90. Reserve fund.—All entrance fees, transfer fees, and fines shall, after the payment of organization expenses, be known as reserve income, and shall be added to the reserve fund of the corporation.

At the close of each fiscal year when the reserve fund does not equal five per centum (5%) of the corporation's outstanding loans, or five thousand dollars (\$5,000.00) whichever is greater, there shall be set apart to the reserve fund twenty per centum (20%) of the net income of the credit union which has accumulated during the year. At the end of any fiscal year when the reserve fund equals or is in excess of five per centum (5%) of the corporation's outstanding loans or five thousand dollars (\$5,000.00) whichever is greater, then the board of directors may reduce the amount to be set apart to the reserve fund each year to an amount not less than ten per centum (10%) of the net income of the credit union. When the reserve fund is equal to seven per centum (7%) of the outstanding loans or ten thousand dollars (\$10,000.00) whichever is the greater, the board of directors shall not be required to make an allocation to the reserve fund. The reserve fund shall not be distributed to the members except upon dissolution of the credit union. Nothing in this section shall be construed as limiting the amount that a credit union may set apart to its reserve fund. The reserve fund shall belong to the credit union and all loans which the board of directors decide are uncollectible may at the option of the board of directors be charged against the reserve fund, undivided profits, or income during the year. (1915, c. 115, s. 21; C. S., s. 5222; 1939, c. 400, s. 2; 1955, c. 1135, s. 1; 1969, c. 69, ss. 2, 10.)

Editor's Note.—

The 1969 amendment substituted "corporation's outstanding loans" for "capital sentences of the second paragraph and sub-and liabilities" in the first and second

stituted "seven per centum (7%) of the outstanding loans" for "ten per centum (10%) of the capital and liabilities" in the third sentence of that paragraph.

§ 54-91. Dividends.—The board of directors of any credit union may declare dividends as its bylaws provide.

Dividends shall be paid on fully paid shares outstanding at the close of the accounting period, but shares which become fully paid by the tenth of any month of the period may be entitled to a proportional part of such dividend, calculated from the first day of the month. (1915, c. 115, s. 22; C. S., s. 5223; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 3; 1965, c. 956, s. 15; 1969, c. 69, ss. 3, 4; 1973, c. 199, s. 7.)

Editor's Note.—

The 1965 amendment added the proviso at the end of the section.

The 1969 amendment deleted "semian-ually or annually" following "dividends" in the first sentence and rewrote the proviso at the end of the section.

The 1973 amendment eliminated the former first sentence of the second paragraph, which provided that at the close of a fiscal year a credit union might declare

a dividend not to exceed six percent from income, and, in the present second paragraph, deleted "all" preceding "fully paid," substituted "accounting" for "fiscal," deleted "day" following "tenth" and deleted a former proviso to the effect that in any one year not more than twenty-five percent of the undivided earnings could be used to pay a dividend and that the remainder of such dividend should be paid from the current year's earnings.

§ 54-92. Voluntary dissolution.—At any meeting specially called to consider the subject, three fourths of the members present and represented may vote to dissolve the corporation and upon such vote shall signify their consent to such dissolution in writing. Such corporation shall then file in the office of the Administrator of Credit Unions such consent, attested by its secretary or treasurer and

its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly certified. The Administrator of Credit Unions, upon receipt of satisfactory proof of the solvency of the corporation, shall issue to such corporation, in duplicate, a certificate to the effect that such consent and statement have been filed and that it appears therefrom that such corporation has complied with this section. Such duplicate certificate shall be filed by the corporation in the office of the register of deeds of the county in which the corporation has its place of business, and thereupon such corporation shall continue in existence only for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs; and may sue and be sued for the purpose of enforcing such debts and obligations until its business and affairs are fully adjusted and wound up. The Administrator of Credit Unions, or an agent appointed by him, shall take possession of the property and business of such corporation and shall proceed to adjust and wind up the business and affairs of the corporation with the power to liquidate its assets and apply the same in discharge of debts, obligations and expenses of such corporation and after paying and adequately providing for the payment of such debts, obligations, and expenses shall pay to the shareholders the balance of the assets, in proportion to the number of shares held by each shareholder. The corporation shall then be dissolved and its certificate of incorporation revoked. The liquidating agent's fee, if any, shall be set by the Administrator of Credit Unions. (1915, c. 115, s. 24; C. S., s. 5224; 1925, c. 73, ss. 3, 15; 1935, c. 87; 1957, c. 989, s. 4; 1965, c. 956, s. 1; 1967, c. 823, s. 11.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—

The 1965 amendment substituted "Administrator of Credit Unions" for "Superintendent of Credit Unions" throughout this section.

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of superior court" in the fourth sentence.

ARTICLE 12.

Shares in the Corporation.

§ 54-94. **Ownership of shares.**—The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on the shares, undivided surplus, and reserves. Shares may be subscribed for and paid in such manner as the bylaws shall prescribe. The credit union shall have a lien on the shares of any member and upon any dividends payable thereon for and to the extent of any loan made to him and of any dues or fines payable by him. The credit union may, upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of the member's indebtedness. (1915, c. 115, s. 13; C. S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 16, 17.)

Editor's Note. — The 1965 amendment added "undivided surplus, and reserves" at the end of the first sentence, and deleted the former last two paragraphs of this section, which pertained to entrance fees and transfer of shares.

ARTICLE 13.

Members and Officers

§ 54-98. **Who may become members.**—The membership of the corporation shall consist of those persons who have been duly elected to membership and who have subscribed for one or more shares and have paid for the same in

whole or in part, together with the entrance fee as provided in the bylaws, and have complied with such other requirements as the bylaws may contain: Provided, that credit union membership shall be limited to groups having a common bond of occupation or association or residents within a well defined neighborhood community, or rural district, employees of a common employer, or members of a bona fide fraternal, religious, co-operative, labor, rural, educational or similar organization.

The provisions of this subsection shall not prohibit a credit union from maintaining offices from locations other than its main office if the maintenance of such offices shall be reasonably necessary to furnish service to its membership. Provided, however, no such additional offices shall be established to serve persons who are not entitled to membership as defined in the preceding paragraph and would not be entitled to services of the credit union at its main office. Provided further that the establishment of additional offices shall be subject to the approval of the Administrator of Credit Unions.

No credit union shall ever pay any commission or offer compensation for the securing of members or on the sale of shares. (1915, c. 115, s. 6; C. S., s. 5230; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 18.)

Editor's Note. — The 1965 amendment and transferred the former second sentence to appear as the present third paragraph, inserted the second paragraph, graph.

§ 54-101. Election of directors and committees.—(a) Number Elected.—At the first annual meeting, the members shall elect a board of directors of not less than five members and a credit committee of not less than three members to serve staggered terms of one and two years and shall hold office for those terms and until successors qualify. At each subsequent annual meeting, the members shall elect directors and members of the credit committee for a term of two years. The bylaws may authorize the board of directors to appoint a credit committee, or in lieu thereof, appoint one or more loan officers to approve or disapprove loans assigned to him. Except as herein specified, no member of the board of directors shall be a member of the credit committee or of the supervisory committee, hereinafter provided, nor shall one person be a member of more than one such committee. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such terms as may be determined by the bylaws. The board of directors may appoint a membership committee or membership officer from the members of the credit union, other than the treasurer, and assistant treasurers, or a loan officer, and authorize such membership committee or membership officer to approve applications for membership under such conditions as the board may prescribe, except that such membership committee or membership officer so authorized shall submit to the board at each monthly meeting a list of approved or pending applications for membership received since the previous monthly meeting, together with such other related information as the bylaws or board may require.

(b) Oath of Office.—The oath required of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the Administrator of Credit Unions and filed and preserved in his office. (1915, c. 115, s. 9; C. S., s. 5233; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 19; 1973, c. 199, s. 8.)

Editor's Note. — The 1965 amendment deleted a former reference to the supervisory committee in the first sentence of subsection (a), substituted "directors may al-

so" for "directors as such may also" in the second sentence of that subsection, substituted "the credit committee or of the supervisory committee, hereinafter provided" for "either of such committees" in the third sentence thereof, and added the last sentence. It also substituted "Admin-

istrator of Credit Unions" for "Superintendent of Credit Unions" near the end of subsection (b).

The 1973 amendment rewrote the former first and second sentences of subsection (a) as the present first, second and third sentences.

§ 54-102. Duties of board of directors.

(b) General Management.—The board of directors shall have the general management of the affairs, funds, and records of the corporation, shall meet as often as may be necessary, and, unless the bylaws shall specifically reserve all or any of these duties to the members, it shall be the special duty of the directors:

- (1) To act upon all applications for membership and the expulsion of members.
- (2) To fix the amount of the surety bond which shall be required of every person employed, appointed or elected by the credit union to any position requiring the receipt, payment or custody of money or personal property owned by the credit union or in its custody or control as collateral or otherwise, in accordance with the provisions of subdivision (5) of G.S. 54-75.
- (3) To determine from time to time the rate of interest which shall be allowed on deposits and charged on loans.
- (4) To fix the maximum number of shares which may be held by and the maximum amount which may be lent to any one member; to declare dividends; and to recommend amendments to the bylaws.
- (5) To fill vacancies in the board of directors or in the credit committees until the election and qualification of successors.
- (6) To have charge of the investment of the funds of the corporation except loans to members, and to perform such other duties as the members may from time to time authorize.
- (7) The board of directors at its first meeting after its election shall appoint a supervisory committee, (no more than one of whom may be a member of the board of directors and none a member of the credit committee) of not less than three members who shall serve for such terms as may be fixed by the bylaws; or in lieu thereof, the bylaws may authorize the board of directors to employ and use such clerical and auditing assistants as may be required to perform the duties required by G.S. 54-104. The board of directors may remove or suspend any member of the supervisory committee for neglect of duty, misfeasance, malfeasance, official misconduct, or for other good cause shown.

(1965, c. 956, s. 20; 1973, c. 199, s. 9.)

Editor's Note.—

The 1965 amendment added subdivision (7) of subsection (b).

The 1973 amendment added to the first sentence of subdivision (7) of subsection

(b) the language beginning "or in lieu thereof."

As the rest of the section was not affected by the amendments, it is not set out.

§ 54-103. Duties of credit committee; appointment and duties of loan officers; appointment of loan officers in lieu of credit committee.—

The credit committee shall have the general supervision of all loans to members. It shall be the duty of the credit committee to review all applications for loans, to ascertain whether the loan sought is for provident or productive purpose, and to determine whether or not the security offered, in its judgment, is sufficient and the terms proper. The credit committee shall meet as often as may be required after due notice has been given to each member thereof, but not less than once a month, shall keep a record of all meetings, and shall make a report to the members at the annual meetings.

The credit committee may appoint one or more loan officers to act under the supervision of the credit committee and such loan officers, when so appointed, may make loans without necessity for a meeting of or approval by any members of the credit committee, as provided by the bylaws.

The membership through appropriate bylaws, may authorize the board of directors to appoint one or more loan officers in lieu of a credit committee and in such instances, duties and responsibilities of the credit committee shall be carried out by such loan officer or officers. (1915, c. 115, s. 11; C. S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10.)

Editor's Note.—

The 1965 amendment substituted "Administrator of Credit Unions" for "Superintendent of Credit Unions" near the middle of the section.

The 1969 amendment substituted, "secured and unsecured, up to the legal limit"

for "up to the unsecured limit, or in excess of such limit if such excess is fully secured by unpledged shares in the credit union" at the end of the fifth sentence.

The 1973 amendment rewrote this section.

§ 54-104. Duties of supervisory committee.—The supervisory committee shall make or cause to be made, an annual audit, in accordance with rules and regulations promulgated by the Administrator of Credit Unions, and shall submit a report of that audit to the board of directors and a summary of the report to the members at the next annual meeting of the credit union. The supervisory committee shall make or cause to be made such supplemental audits as deemed necessary by it or as may be ordered by the Administrator of Credit Unions. Any violation of this Subchapter or of the bylaws or of any practice of the corporation which in the opinion of the supervisory committee is unsafe, unsound, or unauthorized, shall be reported to the board of directors and the Administrator of Credit Unions within seven days after its discovery. (1915, c. 115, s. 12; C. S., s. 5236; 1965, c. 956, s. 21; 1973, c. 199, s. 11.)

Editor's Note. — The 1965 amendment rewrote this section.

The 1973 amendment rewrote this section.

ARTICLE 14.

Supervision and Control.

§ 54-105. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.—In addition to any and all other powers, duties and functions vested in the Administrator of Credit Unions under the provisions of this subchapter, the Administrator of Credit Unions shall have general control, management and supervision over all corporations organized under the provisions of this subchapter. All corporations organized under the provisions of this subchapter shall be subject to the management, control and supervision of the Administrator of Credit Unions as to their conduct, organization, management, business practices and their financial and fiscal matters. The Administrator of Credit Unions may prescribe rules and regulations for the administration of this subchapter, as well as rules and regulations relating to financial records, business practices and the conduct and management of credit unions, and it shall be the duty of the board of directors and of the various officers of the credit union to put into effect and to carry out such regulations. (1915, c. 115, s. 7; C. S., s. 5237; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 6; 1965, c. 956, ss. 1, 22.)

Editor's Note.—

The 1965 amendment substituted "Administrator of Credit Unions" for "Superintendent of Credit Unions" in the first and second sentences, and added the last sentence.

intendent of Credit Unions" in the first and second sentences, and added the last sentence.

§ 54-106. Reports; penalties; fees. — (a) Every corporation organized under this subchapter shall, in January and in July of each year, make a report of condition to the Administrator of Credit Unions giving such information as he shall require, which reports shall be verified by oath of the treasurer and by oath

of a majority of the supervisory committee, and shall make such other and further reports under like oath as the Administrator shall demand at any time.

(b) Each credit union applying on or after July 1, 1973, for a certificate to do business under the provisions of this Subchapter, shall, before receiving such certificate, pay into the office of the administrator of credit unions, a charter fee of five dollars (\$5.00) and an investigation fee of twenty dollars (\$20.00).

(c) Fees to Be Paid to Office of Administrator of Credit Unions.—Each credit union subject to supervision and examination by the Administrator of Credit Unions, including credit unions in process of voluntary liquidation, shall pay into the office of the Administrator of Credit Unions twice each year, in the months of January and July, supervision and examination fees.

The Secretary of Commerce, shall, on or before December 1 of each year, determine and fix the scale of supervisory and examination fees to be assessed during the next calendar year. However, when the costs of any examination exceed the annual fees assessed and paid by the credit union, the Administrator of Credit Unions may, in his discretion, invoke the provisions of G.S. 54-107, giving due consideration to the time and expense incident to such examination, and the ability of the credit union to pay such additional fees. The additional fees, if assessed by the Administrator, in his discretion, shall be paid by each credit union promptly after the completion of the examination; provided that such additional fees shall not exceed the estimated cost of such examination.

No credit union shall be required to pay any supervisory fee until the expiration of 12 months from the date of the issuance of a certificate of incorporation to such credit union.

(d) Any such corporation which neglects to make semiannual reports as provided in subsection (a) of this section, or any of the other reports required by the Administrator of Credit Unions at the time fixed by the Administrator, shall forfeit to the Administrator of Credit Unions five dollars (\$5.00) for each day such neglect continues; and, furthermore, the Administrator of Credit Unions shall have authority, in his discretion, to revoke the certificate of incorporation and take possession of the assets and business of any corporation failing to pay the fees required in this section after serving notice of at least fifteen (15) days upon such corporation of his intention so to do.

(e) Moneys collected under this section shall be deposited with the State Treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the Administrator of Credit Unions in carrying out its supervisory and auditing functions.

(f) All revenue derived from fees will be placed into a special account to be administered solely for the operation of the credit union division. (1915, c. 115, s. 7; C. S., s. 5238; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, s. 7; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12.)

Editor's Note.—

The 1969 amendment rewrote subsection (c) as previously amended in 1965.

The 1971 amendment substituted "Secretary of Commerce" for "Commissioner of Agriculture" in the first sentence of the second paragraph of subsection (c).

The 1973 amendment substituted "July 1, 1973" for "July first, one thousand nine hundred forty-one," and added "and an investigation fee of twenty dollars (\$20.00)" in subsection (b).

§ 54-107. Annual examinations required; payment of cost.—The Administrator of Credit Unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the Administrator shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and docu-

ments, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not.

Whenever the cost of making the annual examination exceeds the annual fees paid by the credit union to the State, the Administrator may charge the credit union fifty dollars (\$50.00) per day, per man for each day required to complete the examination. The Administrator may designate an independent auditing firm to do the work under his direction and supervision, with the cost to be paid by the credit union involved. (1915, c. 115, s. 7; C. S., s. 5239; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 25; 1969, c. 69, ss. 7, 8.)

Editor's Note. — The 1965 amendment substituted "Administrator" for "Superintendent" in the first paragraph, and added the second paragraph.

The 1969 amendment deleted "more than two times" following "exceeds" in the first

sentence of the second paragraph and deleted "except the extra cost of two times the annual fee shall not exceed more than ten percent (10%) of the reserve fund" at the end of the section.

§ 54-108. Revocation of certificate; liquidation.—If any such corporation shall neglect to make its annual report, as provided in this article, or any other report required by the Administrator of Credit Unions for more than fifteen days, or shall fail to pay the charges required, including the fines for delay in filing reports, the Administrator of Credit Unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for fifteen days after such notice, the said Administrator shall, at his discretion, personally or by an agent appointed by him, take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided in § 54-92 of this subchapter. (1915, c. 115, s. 7; C. S., s. 5240; 1925, c. 73, ss. 3, 8; 1935, c. 87; 1957, c. 989, s. 8; 1965, c. 956, s. 1.)

Editor's Note.—

The 1965 amendment substituted "Ad-

ministrator" for "Superintendent" throughout this section.

§ 54-109. When Administrator of Credit Unions may take possession of credit union business and property.—The Administrator of Credit Unions may forthwith take possession and control of the business and property of any credit union to which this subchapter is applicable whenever he shall find that such credit union:

- (1) Is conducting its business contrary to law or the regulations of the Administrator promulgated hereunder;
- (2) Has violated its charter or bylaws;
- (3) Is conducting its business in an unauthorized or unsafe manner;
- (4) Is in an unsound or unsafe condition to transact its business;
- (5) Has an impairment of its capital;
- (6) Cannot with safety and expediency continue business;
- (7) Has neglected or refused to comply with the terms of a duly issued order of the Administrator;
- (8) Has suspended the payment of its obligations;
- (9) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or agency of the Administrator; or
- (10) Has refused to submit a sworn statement verified under oath by its treasurer and/or president or other responsible officers regarding its affairs and upon such inquiries as may be submitted to it by the Administrator.

The Administrator of Credit Unions upon taking possession of the property and business of any credit union for the reasons above set forth shall retain such possession until such time as he may permit it to resume business or he may order that its affairs be finally liquidated, as provided in § 54-92 of this subchapter.

The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in article 33 of chapter 143 of the General Statutes of North Carolina, as amended. (1915, c. 115, s. 7; C. S., s. 5241; 1925, c. 73, ss. 3, 9; 1935, c. 87; 1957, c. 989, s. 9; 1965, c. 956, s. 26.)

Editor's Note.—

The 1965 amendment rewrote this section.

ARTICLE 15.

Central Associations.

§ 54-110. Central association.—(a) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearinghouse in the settlement of these accounts, the Administrator of Credit Unions shall, upon receipt and investigation of charters and bylaws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this article.

(1965, c. 956, s. 1.)

Editor's Note. — The 1965 amendment substituted "Administrator of Credit Unions" for "Superintendent of Credit Unions" in subsection (a).

As the rest of the section was not affected by the amendment, it is not set out.

SUBCHAPTER IV. CO-OPERATIVE ASSOCIATIONS.

ARTICLE 16.

Organization of Associations. -

§ 54-114. Certificate of incorporation.—The original articles of incorporation of corporations organized under this subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the Secretary of State. A like verified copy of such articles and certificate of the Secretary of State, showing the date when such articles were filed with and accepted by the Secretary of State, within thirty days of such filing and acceptance, shall be filed with and recorded by the register of deeds of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The register of deeds shall forthwith transmit to the Secretary of State a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the Secretary of State shall issue a certificate of incorporation. (1915, c. 144, s. 3; C. S., s. 5245; 1967, c. 823, s. 12.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "reg-

ister of deeds" for "clerk of the superior court" in the second sentence and for "clerk of court" in the third sentence.

§ 54-115. Fees for incorporation.—For filing the articles of incorporation of corporations organized under this subchapter, there shall be paid the Secretary of State ten dollars and his fees allowed by law, and for the filing of an amendment to such articles, five dollars and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars, such fee for filing either the articles of incorporation

or amendments thereto shall be two dollars. (1915, c. 144, s. 4; C. S., s. 5246; 1967, c. 823, s. 13.)

Cross Reference.—See Editor's note to § 53-5. effective Jan. 1, 1968, deleted the former last sentence, relating to the fee for recording a copy of the articles.

Editor's Note. — The 1967 amendment,

ARTICLE 18.

Powers and Duties.

§ 54-125. **Amendment of articles.**—The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on ten days' notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid-up capital at the time the amendment is adopted. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the Secretary of State and of the register of deeds of the county where the principal place of business is located. (1915, c. 144, s. 7; C. S., s. 5256; 1967, c. 823, s. 14.)

Cross Reference.—See Editor's note to § 53-5. effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the court" in the last sentence.

Editor's Note. — The 1967 amendment,

SUBCHAPTER V. MARKETING ASSOCIATIONS.

ARTICLE 20.

Members and Officers.

§ 54-147. **Election of officers.**—The directors shall elect a president, one or more vice-presidents, a secretary and treasurer who need not be directors, and they may combine the offices of secretary and treasurer designating the combined office as secretary-treasurer. They shall elect from their number a chairman and vice-chairman unless the president and vice-presidents are members of the board. The board may elect or appoint such additional officers as are necessary and appropriate. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such a case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C. S., s. 5259(t); 1971, c. 925.)

Editor's Note.—

The 1971 amendment combined the former first and second sentences, eliminating

a requirement that the president and vice-presidents be directors, and added the present second and third sentences.

ARTICLE 22.

Merger, Consolidation and Other Fundamental Changes.

§ 54-162. **Articles of merger or consolidation.** — (a) Upon such approval, articles of merger or articles of consolidation shall be executed by each association and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register

of deeds of each county wherein the constituent associations have their principal places of business or their registered offices.

(1967, c. 823, s. 15.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in subsection (a).

As subsections (b) and (c) were not changed by the amendment, they are not set out.

§ 54-166. Rights of objecting members.

(c) If within the 30-day period mentioned in subsection (b) of this section the member and the association do not agree as to the fair market value of such stock or other property rights or interests, the member may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county in which the association has its registered office or principal place of business asking for the appointment by the clerk of the superior court of that county of three qualified and disinterested appraisers to appraise the fair market value of such stock or other property rights or interests. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the association at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the member, upon depositing with the court the proper stock certificates or other evidence of such property rights or interests, shall be entitled to judgment against the association for the appraised value thereof as of the day prior to the date on which the vote was taken, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 of the General Statutes for the trial of cases under the eminent domain law of this State, and with the same right of appeal to the appellate division as is permitted in that Chapter. The court shall assess the cost of the proceedings as it shall deem equitable. Upon payment of the judgment the owner of such stock or other property rights or interests shall cease to have any interest in the association and the association shall be entitled to have said stock certificates or other evidence of such property rights or interests surrendered to the association by the clerk of court. Unless the member shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder, but in that event nothing herein shall impair his status as a member.

(1973, c. 108, s. 19.)

Editor's Note. — The 1973 amendment substituted "appellate division" for "Supreme Court" in the fourth sentence of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Chapter 55.

Business Corporation Act.

Article 1.

General Provisions.

Sec.

55-3. Applicability of Chapter.

Article 4.

Powers and Management.

55-19. Indemnification of directors, officers, employees or agents; general provisions.

55-20. Indemnification in actions by outsiders.

55-29. Informal or irregular action by directors or committees; attendance by telephone.

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Article 5.

Corporate Finance.

55-44.1. Rights of holders of debt securities.

Article 6.

Shareholders.

55-55. Shareholders' derivative actions.

55-56. Preemptive rights.

Article 7.

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Sec.

55-75 to 55-98. [Repealed.]

Article 8.

Fundamental Changes.

55-108.1. Mergers without approval of the shareholders of the surviving corporation.

55-113.1. Fundamental changes in reorganization proceedings.

Article 9.

Dissolution and Liquidation.

55-125.1. Discretion of court to grant relief other than dissolution.

55-129. Duties of officials as to decrees and orders concerning dissolution or charter amendment.

Article 10.

Foreign Corporations.

55-146.1. Alternative jurisdiction over and service of process on foreign corporations.

Cross Reference.—As to jurisdiction of the superior court division over proceedings under this Chapter, see § 7A-249.

ARTICLE 1.

General Provisions.

§ 55-1. Title.

Editor's Note.—

For article reevaluating the Business Corporation Act, see 43 N.C.L. Rev. 768 (1965). For case law survey as to corporations, see 44 N.C.L. Rev. 950 (1966). For a note on the liability of directors and officers for negligent management, see 45

N.C.L. Rev. 748 (1967). For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

Cited in *Raab & Co. v. Independence Corp.*, 9 N.C. App. 674, 177 S.E.2d 337 (1970).

§ 55-2. Definitions.

Applied in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965); *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Cited in *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969).

§ 55-3. Applicability of Chapter. — (a) The provisions of this Chapter shall apply to every corporation for profit, and, so far as appropriate, to every corporation not for profit having a capital stock, now existing or hereafter formed, and to the outstanding and future securities thereof, unless the corporation is expressly excepted from the operation hereof or except to the extent that there is other specific statutory provision particularly applicable to the corporation or inconsistent with some provisions of this Chapter, in which case that other provision prevails.

(1973, c. 469, s. 1.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, substituted "except to the extent that" for "unless" near the middle of subsection (a).

As subsections (b) and (c) were not changed by the amendment, they are not set out.

The provisions of the Business Corporation Act are applicable to domestic banks operating in North Carolina. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Domestic banking corporations are not

expressly excepted from the operation of the Business Corporation Act, and the Supreme Court knows of no "specific statutory provision particularly applicable" to domestic banks operating in North Carolina or inconsistent with some provisions of the Business Corporation Act, so as to make such provision prevail, nor has any such specific statutory provision been called to the Supreme Court's attention. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-3.1. Effect of acquisition of all shares by less than three persons.

When Corporation Regarded as An Association of Persons.—When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. *Henderson v. Security Mtge. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

Corporation as Alter Ego of Dominant Shareholder. — The mere fact that one person owns all of the stock of a corporation does not make its acts the acts of the stockholder so as to impose liability therefor upon him. However, when the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corpora-

tion and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. *Henderson v. Security Mtge. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

Chattel Mortgage Executed in Name of Corporation by Person Acquiring All Stock Is Corporate Act.—Acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity, and the execution in the name of the corporation by such person of a chattel mortgage is a corporate act and binding, provided the rights of its then existing creditors are not affected. *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E.2d 559 (1966).

Stated in *Sharpe v. Grindstaff*, 329 F. Supp. 405 (M.D.N.C. 1970).

ARTICLE 2.

Execution and Filing of Certain Corporate Documents.

§ 55-4. Execution of corporate documents for filing; filing, recording and effectiveness.—(a) Whenever the provisions of this chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this chapter:

- (1) There shall be an original executed document and also one conformed copy.
- (2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. In the case of a banking corporation, a cashier or an

assistant cashier may act in lieu of a secretary or assistant secretary. If required to be executed by designated individuals, each of them shall sign.

- (3) Except where the provisions of this chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.
- (4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments, as the case may be) or may in lieu of such extension contain the legend, after the name of the signers substantially as follows: "Original duly verified (acknowledged) by all signers."
- (5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month, and year of the filing thereof and shall file the same in his office. The Secretary of State, shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the corporation or its representative.
- (6) The copy, certified as aforesaid, shall, within sixty days after the receipt by the corporation or its representative be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a)(5) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected, provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than twenty days subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected. Unless otherwise provided in this chapter with respect to some specific document, failure to deliver it for recording in the office of the register of deeds shall only subject the corporation to a penalty of one hundred dollars (\$100.00) to be collected by the Secretary of State.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office or, if such be the request, to make or cause to be

made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—

The first 1967 amendment rewrote subsection (b).

The second 1967 amendment, effective

Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in the first sentence and for "clerk" in the second sentence of subdivision (6) of subsection (a) and for "clerk of the superior court" in subsection (b).

ARTICLE 3.

Formation, Name and Registered Office.

§ 55-6. Incorporators.—One or more natural persons, whether or not residents of this State, of the age of 18 years or more may act as incorporators of a corporation by signing and acknowledging articles of incorporation, which shall be filed in accordance with the provisions of G.S. 55-4. The acknowledgment shall be before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. (Code, ss. 677, 678, 679, 682; 1885, cc. 19, 190; 1893, c. 318; 1897, c. 204; 1901, c. 2, ss. 8, 9; cc. 6, 41; 1903, c. 453; Rev., ss. 1137, 1139; C. S., s. 1114; 1945, c. 635; G. S., ss. 55-2, 55-3; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1969, c. 751, s. 1; 1971, c. 1231, s. 1.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, substituted "One" for "Three" at the beginning of the section.

The 1971 amendment substituted "18" for "21" in the first sentence.

§ 55-7. Articles of incorporation.—The articles of incorporation shall set forth:

- (3) The purpose or purposes for which the corporation is organized. It shall be sufficient to state, either alone or with other purposes, that the purpose for which the corporation is organized is to engage in any lawful act or activity for which corporations may be organized under this Chapter; and by such statement all lawful acts and activities for corporations organized under this Chapter shall be within the purposes of the corporation, subject to any express limitations.
- (9) The number of directors constituting the initial board of directors (who may be classified in accordance with the provisions of G.S. 55-26) and the name and address, including street and number, if any, of each person who is to serve as a director until the first meeting of shareholders or until his successor be elected and qualified.

(1969, c. 751, s. 2; 1973, c. 469, s. 2.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote subdivision (9).

The 1973 amendment, effective Oct. 1, 1973, added the second sentence of subdivision (3).

As the other subdivisions were not changed by the amendments, only the introductory language and subdivisions (3) and (9) are set out.

§ 55-8. Corporate existence; filing of articles of incorporation; effect.—The time when corporate existence begins is determined by the provisions of G.S. 55-4, and a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, except as against this State in a proceeding to annul or

revoke the articles of incorporation. (1901, c. 2, s. 10; Rev., s. 1140; C. S., s. 1116; G. S., s. 55-4; 1955, c. 1371, s. 1; 1957, c. 550, s. 3; 1967, c. 13, s. 3.)

Editor's Note.—

The 1967 amendment rewrote this section.

§ 55-11. Organization meeting of directors.—After the filing of the articles of incorporation in the office of the Secretary of State, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers, and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days' notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organization meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55-29. (Code, s. 665; 1901, c. 2, s. 18; Rev., s. 1142; C. S., s. 1118; G. S., s. 55-6; 1955, c. 1371, s. 1; 1969, c. 751, s. 3.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added the last sentence.

§ 55-12. Corporate name.

(c) The corporate name shall not, subject to the provisions of G.S. 55-137 (c), be the same as, or deceptively similar to, the name of any domestic corporation or of any foreign corporation authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered by some other person in the manner prescribed in this section.

(f) The reservation of name, pursuant to subsections (d) and (e) of this section, shall be made by filing with the Secretary of State a verified application therefor stating the name and address of the applicant, and the Secretary of State shall, upon tender of the fee hereinafter prescribed, reserve the name exclusively for the applicant unless he finds that the name is not available under the provisions of this section.

(h) Any foreign corporation not transacting business in this State may register its corporate name, if, not prohibited by this section, by filing with the Secretary of State a verified application therefor setting forth the name and address of the principal office of the corporation, the jurisdiction in which it is incorporated, the date of its incorporation, a statement that it is organized and doing business in good standing under the laws of the jurisdiction in which it is incorporated, and a brief statement of the business in which it is engaged; and the Secretary of State shall, upon tender of the fee prescribed by G.S. 55-155(a) (1), register the name exclusively for the use of such foreign corporation, unless he finds that the name is not available under the provisions of this section. Such registration shall be effective for a period of one year, and it may be renewed from year to year, not to exceed ten years, by filing with the Secretary of State a verified renewal application setting forth the same facts required to be set forth in the original application for registration. Any renewal application filed after the expiration of the registration shall be treated as a new application for registration.

(i) The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false.

(j) The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State.

(k) The issuance of a corporate charter to any domestic corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or the common law; and the issuance of such charter shall not be a defense to an action for violation of any such rights. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C. S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, inserted "or registered" and substituted "by" for "to" near the end of subsection (c), inserted "stating the name and address of the applicant" near the middle of subsection (f), inserted present subsections (h) and (i) and redesignated former subsection (h) as (j).

The 1973 amendment, effective Oct. 1, 1973, added subsection (k).

Only the subsections added or changed by the amendments are set out.

Applied in *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

Cited in *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969).

§ 55-13. Registered office and registered agent.

Stated in *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968).

§ 55-14. Change of registered office or registered agent.

(c) If the statement purporting to effectuate such changes is not recorded in all the offices wherein recording is required by this section, persons asserting claims against the corporation may treat as the registered agent or registered office of the corporation either the one newly designated in the statement or the preexisting one.

(e) In lieu of the procedure set out in subsection (a) above the location of the registered office of a domestic corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of each of the corporations recited in the certificate. Such certificate shall be filed in duplicate in the office of the Secretary of State who shall then furnish a certified copy of the same, showing the date of such filing, and shall return the copy so certified to the registered agent, and the copy, certified as aforesaid, shall, within 60 days after the receipt by the registered agent be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the registered agent. The fee to be charged by the Secretary of State for the filing of such certificate shall be three dollars (\$3.00) for each corporation listed in said certificate, the total not to exceed two hundred dollars (\$200.00). (1901, c. 2, s. 31; Rev., s. 1176; C. S., s. 1133; G. S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—

The 1965 amendment added subsection (e).

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in the second

sentence and for "clerk" in the third sentence of subsection (e).

The first 1973 amendment, effective Oct. 1, 1973, deleted "a fee of" preceding "three dollars" and added "the total not to exceed two hundred dollars (\$200.00)" in the last sentence of subsection (e).

The second 1973 amendment, effective Oct. 1, 1973, substituted "not recorded"

for "recorded in some but not" near the beginning of subsection (c).

As subsections (a), (b) and (d) were not changed by the amendments, they are not set out.

For note on the 1965 amendments to this chapter, see 44 N.C.L. Rev. 1106 (1966).

§ 55-16. Bylaws.—(a) The initial bylaws may be adopted by the board of directors at its organization meeting. Thereafter bylaws may be adopted, amended or repealed either by the shareholders or by the board of directors, but

- (1) No bylaw adopted or amended by the shareholders shall be altered or repealed by the board of directors, except where the charter or a bylaw adopted or approved by the shareholders authorizes the board of directors to adopt, amend or repeal the bylaws;
- (2) Any bylaw changing the statutory requirement for a quorum of directors or action by directors, as permitted by G.S. 55-28(d), or changing the statutory requirement for a quorum of shareholders or action by shareholders, as permitted by G.S. 55-65 and G.S. 55-66, may be adopted only by the shareholders, and any such bylaw can itself be amended or repealed only by the shareholders acting pursuant to any different quorum and greater vote so prescribed;
- (3) No bylaw authorizing compensation of officers measured by the amount of a corporation's income or volume of business shall be valid after five years from its adoption unless renewed by the vote of the holders of a majority of the outstanding shares regardless of limitation on voting rights;
- (4) The charter or a bylaw adopted by the shareholders may limit or eliminate the power of the board of directors to adopt, amend or repeal the bylaws or any specific bylaw.

(1973, c. 469, s. 4.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, rewrote subdivision (2) of subsection (a).

As subsections (b) and (c) were not changed by the amendment, they are not set out.

ARTICLE 4.

Powers and Management.

§ 55-17. General powers.

(b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this chapter or by its charter, every corporation shall also have power:

- (1) To acquire, by purchase, lease, gift, will or otherwise, and to own, hold, improve, use and otherwise deal in and with, real and personal property, or any interest therein, wherever situated.
- (2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
- (3) To enter into contracts of guaranty or suretyship or make other financial arrangements for the benefit of any person, firm or corporation.
- (4) To provide insurance for its benefit on the life or physical or mental ability of any of its officers or employees or on the life or physical or mental ability of any security holder for the purpose of acquiring at his death or disability its securities owned by such security holder, and for these purposes the corporation is deemed to have an insurable in-

terest in its officers, employees, or security holders; and to provide insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest.

- (5) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.
 - (6) To enter into any arrangement with others for the sharing of profits or union of interest with respect to any transaction, operation or venture which the corporation has power to conduct by itself, even if such arrangement involves sharing or delegation of control of such transaction, operation or venture with or to others.
 - (7) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge or other form of security upon all or any of its property, franchises and income.
 - (8) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.
 - (9) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this chapter anywhere in the world.
 - (10) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.
- (1969, c. 751, ss. 7, 8.)

I. IN GENERAL.

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, substituted "any person, firm or corporation" for "its personnel or customers or suppliers" at the end of subdivision (3) and rewrote subdivision (4) of subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

As a general rule, a corporation may use or adopt any seal. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

And May Adopt Seal for Special Occasion. — If a corporation adopts a seal different from its corporate seal for a special occasion, or if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

Any Device, etc.—

A corporate seal may consist of anything found upon a paper and which ap-

pears to have been put there by due authority or to have been adopted and used by such authority as and for the seal of the corporation. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

Burden of Proof as to Seal on Contract and Statute of Limitations.—The burden is upon plaintiffs to prove that the action accrued within the time limited by § 1-47, by showing that the company adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the 3-year statute, § 1-52, other than the matter of a seal. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

Cited in *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

§ 55-18. Defense of ultra vires.

The doctrine of ultra vires, etc.—

This section has curtailed to a considerable degree the doctrine of ultra vires.

Piedmont Aviation, Inc. v. S & W Motor Lines, Inc., 262 N.C. 135, 136 S.E.2d 658 (1964).

§ 55-19. Indemnification of directors, officers, employees or agents; general provisions.—(a) Except as indemnification of a director or officer of a corporation is permitted by this section or by G.S. 55-20 and 55-21, no provision, hereafter made or adopted, whether contained in the charter, the bylaws, a resolution, a contract or otherwise, whereby the corporation purports to exempt or indemnify any director or officer of a corporation with respect to any liability or litigation expenses arising out of his activities as director or officer shall be valid.

(b) As used in this section and in G.S. 55-20 and 55-21, the term "officer" includes any dominant shareholder engaged to perform services for the corporation, whether as employee or independent contractor; and the term "person" includes the legal representative of such person.

(c) Anything in this section or in G.S. 55-20 or 55-21 to the contrary notwithstanding, a corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section or in G.S. 55-20 or G.S. 55-21. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5.)

Editor's Note. — The 1969 amendment inserted "by this section or" in subsection (a), added the definition of "person" in subsection (b), and added subsections (c) and (d).

The 1973 amendment, effective Oct. 1, 1973, added "or in G.S. 55-20 or G.S. 55-21" at the end of subsection (d).

§ 55-20. Indemnification in actions by outsiders. — (a) When by reason of the fact that he is or was serving as director, officer, employee or agent of a corporation, or in any such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, any person is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, not brought by the corporation nor brought by any party seeking derivatively to enforce a liability of such a person to the corporation, such person shall be entitled to indemnification or reimbursement by the corporation for any expenses, including attorneys' fees, or any liabilities which he may have incurred in consequence of such action, suit or proceeding, under the following conditions:

- (1) If such person is wholly successful in his defense on the merits, or if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person, he shall be entitled to reimbursement from the corporation of all his reasonable expenses of defense or participation, including attorneys' fees.
- (2) If such person is wholly successful in his defense otherwise than solely on the merits, the corporation may pay or agree to pay to him such expenses of defense or participation, including attorneys' fees, as the board of directors in good faith shall deem reasonable, regardless of any adverse interest of any or all of the directors.
- (3) If such person is not wholly successful or is unsuccessful in his defense, or the proceeding to which he is a party results in his indictment, fine or penalty, the corporation may pay or agree to pay, in whole or in part,

such expenses of defense or participation, including attorneys' fees, and the amount of any judgment, money decree, fine, penalty or settlement for which he may have become liable, if

- a. A plan for such payment is approved by a consent in writing signed by the holders of all shares entitled to vote or such plan is sent to the holders of all shares entitled to vote, with notice of a shareholders' meeting, whether annual or special, to be held to take action thereon and if at such meeting a plan is approved by the holders of a majority of such shares, exclusive of the shares held directly or indirectly by any persons to be benefited by the plan if approved, or
- b. A majority of a quorum consisting of directors who are not parties to such action, suit or proceeding shall determine that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful, and the corporation shall, not later than 60 days before any such payment or agreement to pay is made, send to all shareholders of record on a record date not more than 10 days prior to the date of mailing, at their registered addresses, a statement specifying the persons to be paid, the amounts to be paid, and the nature and status of the suit or proceedings at the time of mailing.
- c. In a proceeding brought by such person for such determination in the superior court of the district where the corporation has its registered office it shall be determined that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. In such a proceeding, the court in its discretion may order notice thereof to be sent to the shareholders of the corporation in such manner and in such form as it may deem appropriate, at the expense of the corporation; and it may allow all shareholders so notified to be heard in opposition to the determination requested.

(b) The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6.)

Editor's Note. — The 1969 amendment rewrote this section.

The 1973 amendment, effective Oct. 1, 1973, substituted "by reason of the fact that he is or was" for "because of his duties or activities while" near the beginning of the introductory paragraph of subsection (a), inserted "or not opposed to"

in subdivision (3)b of subsection (a) and added in subdivision (3)b the language beginning "and the corporation shall" and ending "at the time of mailing." The amendment also inserted "or not opposed to" in the first sentence of subdivision (3)c of subsection (a).

§ 55-21. Indemnity for litigation expenses in corporate action.—(a) When a present or former director, officer, employee or agent of a corporation or any person who has served or is serving in such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, is sued, alone or with others, in the courts of this State, in any action seeking to establish his liability to the corporation arising out of his alleged dereliction of

duty to the corporation, he shall in turn be entitled to indemnification or reimbursement from the corporation for so much of his expenses of defense, including attorneys' fees, as the court in its discretion, upon motion for indemnification or reimbursement, duly made in such action, finds to be reasonable, if:

- (1) Such person is successful in whole or in part in the action against him or in any settlement thereof and the court finds that his conduct fairly and equitably merits such relief; or
- (2) The court finds, despite his adjudication of liability, that such person has acted honestly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief.

(1969, c. 797, s. 3.)

Editor's Note. — The 1969 amendment rewrote subsection (a). changed by the amendment, only subsection (a) is set out.

As the rest of the section was not

§ 55-22. Loans and guaranties.—(a) Subject to the provisions of subsection (b) hereof, except with the consent of the holders of a majority of all the shares outstanding, regardless of limitation on voting rights, other than the shares held by the adversely interested party, a corporation shall not, directly or indirectly, make any loan of money or property to, or guarantee or otherwise secure the obligation of:

- (1) Any directors or officers of the corporation; or
- (2) Any corporation of which the officers and directors of the lending or securing corporation own more than fifty percent (50%) of the outstanding securities of any class; or
- (3) Any dominant shareholder or any other corporation of which said shareholder is a dominant shareholder, unless that corporation is a subsidiary of the lending or securing corporation; or
- (4) Any person upon the security of the shares of any corporation mentioned in subdivisions (2) and (3) of this subsection. A sale on credit in the ordinary course of business is not a loan within the meaning of this section.

(b) If all shareholders, regardless of limitation on voting rights, are adversely interested in the proposed loan, guaranty, or other form of security, such transaction may be entered into by the corporation only with the consent of all such shareholders.

(c) The provisions of this section do not apply to loans, guaranties, or other forms of security extended by banks, industrial banks, building and loan associations, land and loan associations, credit unions or insurance companies, or to loans permitted under any statute regulating any special class of corporations. (1955, c. 1371, s. 1; 1959, c. 1316, s. 6; 1961, c. 198; 1969, c. 751, s. 9.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote the introductory paragraph

of subsection (a), inserted present subsection (b) and redesignated former subsection (b) as (c).

§ 55-24. Board of directors.

Directors' Right of Management Is Subject to Stockholders Lawful Agreements.

—Under subsection (a) the board of directors is given the right to manage the affairs of the corporation subject to the provisions of the charter, the bylaws or agreements between the shareholders otherwise lawful. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Such Agreements on Voting Are Valid

Unless There Is Fraud or Prejudice. — The Business Corporation Act clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner—including agreements for the election of directors and corporate officers—is not invalid unless it is inspired by fraud or will prej-

udice the other stockholders. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Agreements for Future Management Must Be "Otherwise Lawful."—Both this section and § 55-73 require that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Will Be Declared Invalid.—Agreements providing for the future management and control of a corporation which violate the express charter or statutory provision, contem-

plate an illegal object, involve any fraud, oppression or wrong against other stockholders, or are made in consideration of a private benefit to the promisor will be declared invalid. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Same Good Faith Required of Promoters as Directors.—The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other and the law requires of them the same good faith it exacts from directors and other fiduciaries. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

§ 55-25. Number, election and term of directors.—(a) The number constituting the board of directors shall not be fewer than three, except that the initial board of directors fixed by the articles of incorporation may be fewer than three until the issuance of shares and except also that if and so long as all the shares of a corporation are owned of record by either one or two shareholders the number of directors may be fewer than three but not fewer than the number of such shareholders. The number constituting the initial board of directors shall be fixed by the articles of incorporation. In the absence of a provision in the articles of incorporation, the charter, or the bylaws fixing the number of directors, the number shall be the same as that fixed in the articles of incorporation for the initial board of directors, subject to the provisions of this section. The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors, and, if so, shall designate the manner in which such number shall from time to time be determined. If the fixing of a maximum and minimum number of directors is authorized, the articles of incorporation, the charter, or the bylaws may provide that any directorships not filled by the shareholders shall be treated as vacancies to be filled by and in the discretion of the board of directors.

(b) The number of directors may be increased or decreased from time to time only by amendment to the charter or to the bylaws adopted by the shareholders, but no such decrease shall be made when the number of shares voting against the proposal for decrease would be sufficient to elect a director if such shares could be voted cumulatively at an annual election. Whenever a class or a series of shares is entitled to elect one or more directors under authority granted by the charter, the provisions of this paragraph apply to the vote of that class or series for such election and not to the vote of the outstanding shares as a whole.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter directors shall be elected at the first meeting of the shareholders held for that purpose and at each subsequent annual meeting.

(d) Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

(e) If any shareholder so demands, election of directors by the shareholders shall be by ballot, unless the charter or the bylaws otherwise provide.

(f) The number of votes necessary to elect a director and the procedure for election of directors are governed by the provisions of G.S. 55-67 (c). (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C. S., ss. 1144, 1175; 1927, c. 138; G. S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11.)

Editor's Note.—

The 1969 amendment, effective Oct. 1,

1969, rewrote subsection (a) and added subsection (f).

§ 55-26. Staggered board of directors.—When the board of directors shall consist of nine or more members, in lieu of electing the whole number of directors annually, it may be provided in the charter or in the bylaws adopted by

the shareholders that the directors be staggered by division into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No such classification of directors shall, unless made in the charter, be effective prior to the first annual meeting of shareholders. Boards of directors may also be classified otherwise than by staggering. Corporations having a lawfully staggered or otherwise classified board of directors when this chapter goes into effect may continue their existing classification even though not conforming to this section. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C. S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917; G. S., s. 55-48; 1955, c. 914, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, s. 7.)

Editor's Note.—

This section is set out to correct a typographical error in the replacement volume.

§ 55-27. Vacancies and removal of directors.

(c) Unless the charter or the bylaws otherwise provide, vacancies may be filled by a majority of the remaining directors even though less than a quorum or by a sole remaining director. If a vacancy occurs with respect to a director who had been elected by the votes of a particular class of shares voting as a class, the vacancy shall be filled by the remaining directors or the remaining sole director elected by that class. A vacancy created by an increase in the authorized number of directors shall be filled only by election at an annual meeting or at a special meeting of shareholders called for that purpose, except as provided in G.S. 55-25 (a).

(f) Unless otherwise provided in the charter or a bylaw adopted by the shareholders, the entire board of directors or any individual director may be removed from office with or without cause by a vote of shareholders holding a majority of the outstanding shares entitled to vote at any election of directors. However, unless the entire board is removed, an individual director shall not be removed when the number of shares voting against the proposal for removal would be sufficient to elect a director if such shares could be voted cumulatively at an annual election. If any or all directors are so removed, new directors may be elected at the same meeting. Whenever a class or series of shares is entitled to elect one or more directors under authority granted by the charter the provisions of this subsection apply to the vote of that class or series as to those directors and not to the vote of the outstanding shares as a whole.

(1959, c. 1316, s. 34; 1973, c. 469, s. 7.)

Editor's Note.—

Subsection (c) is set out to correct a typographical error in the replacement volume.

The 1973 amendment, effective Oct. 1, 1973, substituted "Unless otherwise pro-

vided in the charter or a bylaw adopted by the shareholders" for "unless the charter or the bylaws otherwise provide" at the beginning of subsection (f).

As the rest of the section was not affected, it is not set out.

§ 55-28. Directors' meetings.

(d) A majority of the number of directors fixed by the charter or bylaws shall constitute a quorum for the transaction of business unless a greater number is required by the charter or a bylaw adopted by the shareholders. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by

this Chapter, the charter or a bylaw adopted by the shareholders. (1955, c. 1371, s. 1; 1969, c. 751, s. 12; 1973, c. 469, s. 8.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, inserted "this chapter" near the end of subsection (d).

The 1973 amendment, effective Oct. 1, 1973, substituted "a bylaw adopted by the shareholders" for "the bylaws" at the end of the first and second sentences of subsection (d).

As the rest of the section was not changed by the amendments, only subsection (d) is set out.

Cited in S & W Realty & Bonded Commercial Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

§ 55-29. Informal or irregular action by directors or committees; attendance by telephone.—(a) Action taken by the required majority of the directors or members of a committee without a meeting is nevertheless board or committee action if:

- (1) Written consent to the action in question is signed by all the directors or members of the committee, as the case may be, and filed with the minutes of the proceedings of the board or committee, whether done before or after the action so taken, or if
- (2) All the shareholders know of the action in question and make no prompt objection thereto, or if
- (3) The directors or committee members are accustomed to take informal action and this custom is generally known to the shareholders and if all the directors or committee members, as the case may be, know of the action in question and no director or committee member makes prompt objection thereto.

(b) If a meeting of directors otherwise valid is held without proper call or notice, action taken at such meeting otherwise valid is deemed ratified by a director who did not attend unless promptly after having knowledge of the action taken and of the impropriety in question he files with the secretary or assistant secretary of the corporation his written objection to the holding of the meeting or to any specific action so taken.

(c) Unless otherwise provided in the charter or bylaws, any one or more directors or members of a committee may participate in a meeting of the board or committee by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other, and such participation in a meeting shall be deemed presence in person at such meeting. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1973, c. 469, ss. 9, 10.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, inserted "required" near the begin-

ning of the introductory paragraph of subsection (a) and added subsection (c).

§ 55-30. Director's adverse interest.

The words "corporate transaction" were intended to apply to a situation where the corporate director is dealing directly with the corporation. *Smith v. Robinson*, 343 F.2d 793 (4th Cir. 1965).

A corporate officer acts in a fiduciary capacity and cannot profit at the expense of the corporation. *Smith v. Robinson*, 343 F.2d 793 (4th Cir. 1965.)

Adversely Interested Party Must Prove Transaction Was Fair.—While it is true

that the North Carolina law and the general law do not prohibit corporate officers from dealing with the corporation the adversely interested party must prove that the transaction was fair, just and reasonable when entered into. *Smith v. Robinson*, 243 F.2d 793 (4th Cir. 1965).

Applied in S & W Realty & Bonded Commercial Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

§ 55-31. Executive and other committees.—(a) Unless otherwise provided in the charter or a bylaw adopted by the shareholders, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate from among its members an executive committee and one or more

other committees, each consisting of two or more directors, and each of which, to the extent provided in the resolution or in the charter or the bylaws of the corporation, shall have and may exercise all of the authority of the board of directors in the management of the corporation, except that no such committee shall have authority as to the following matters:

- (1) The dissolution, merger or consolidation of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.
- (2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.
- (3) The fixing of compensation of the directors for serving on the board or on any such committee.
- (4) The amendment or repeal of the bylaws, or the adoption of new bylaws.
- (5) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(b) Any such committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55-28 (d) or G.S. 55-29.

(c) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof, of any responsibility or liability imposed upon it or him by law. (1955, c. 1371, s. 1; 1969, c. 751, s. 13.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote this section.

Cited in S & W Realty & Bonded Com-

mercial Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

§ 55-32. Liability of directors in certain cases.

Primary Right to Enforce Liabilities Lies in Corporation.—North Carolina statutory law has not changed, but rather has codified the rule that the primary right of enforcement of liabilities to the corporation lies in the corporation, and as such the corporation is the real party in interest and a necessary party to such action. Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Creditor or Stockholder Cannot Maintain

Action without First Demanding Suit by Corporation.—Where the alleged breach or injuries are based on duties owed to the corporation and not to any particular creditor or stockholder, the creditor or stockholder cannot maintain the action without a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so, and a joinder of the corporation as a party. Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

§ 55-33. Jurisdiction over and service on nonresident director.

Interpretation and Validity of Section Depend on Facts.—Questions as to the interpretation and validity of this section must be considered in relation to specific factual situations. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

Subsection (c) Refers to Actions against Director as Such.—Subsection (c) refers to (1) actions in which a former resident of this State who was and is a director of a domestic corporation is a necessary or proper party in his capacity as such director; and (2) actions by shareholders or creditors against a director for violation of his duty as such director. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

It Is Inapplicable to Action against One Not Director or for Actions after Removal.—Subsection (c) has no application to an action against a person who is not a director of a corporation at the time the action is instituted, or to an action which seeks recovery against a director for alleged wrongful conduct subsequent to his removal from office as director. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

When It Applies, Subsection (d) Provides Method of Service.—When subsection (c) is applicable, subsection (d) provides the exclusive method of service of process. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

§ 55-35. Duty of directors and officers to corporation.

Editor's Note.—For a note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

For note on the fiduciary duty of interested directors and the business judgment rule, see 45 N.C.L. Rev. 755 (1967).

Directors owe the corporation fidelity and the duty to use due care in the management of its business. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

§ 55-36. Execution of corporate instruments; authority and proof.

Authority of Agent Must Be Ascertained.—A party relying upon the authority of an agent to act for his principal under subsection (e) must ascertain the extent of such agent's authority. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 262 N.C. 79, 136 S.E.2d 202 (1964).

But Principal Is Liable for Agent's Acts within Apparent Scope of Authority. — A principal is liable not only for acts ex-

pressly authorized but also for acts within the apparent scope of the authority with which the principal has clothed the agent. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 262 N.C. 79, 136 S.E.2d 202 (1964).

Quoted in *Krechel v. Mercer*, 262 N.C. 243, 136 S.E.2d 608 (1964).

Cited in *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E.2d 559 (1966).

§ 55-36.1. Declaring certain corporate conveyances prior to January 1, 1969 valid.—Any deed, deed of trust, or other conveyance for land in this State made on behalf of a corporation prior to January 1, 1969, where the president or vice-president has appeared before a notary public and the secretary or assistant secretary has attested and placed the corporate seal of such corporation upon the instrument and the instrument was executed by the president or vice-president on behalf of such corporation by its authority duly given and said certificate recites that the secretary or assistant secretary acknowledges the instrument to be the act and deed of the corporation, in the absence of an acknowledgment of the president or vice-president, the instrument and acknowledgment being otherwise regular, is hereby declared to be a good and valid deed or conveyance by such corporation for all purposes, and shall be admitted to probate and registration, and shall pass title to the property therein conveyed to the grantee as fully as if said deed, deed of trust, or other conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of said deed, deed of trust or other conveyance. (1969, c. 953, s. 1.)

Editor's Note.—Session Laws 1969, c. 953, s. 1½, provides that the act shall not apply to pending litigation.

§ 55-37. Books and records.

When Proceedings May Be Proved by Parol Testimony.—When it is shown that no minutes were made of a particular meeting, or that they are incomplete, the proceedings may be proved by parol testimony. *S & W Realty & Bonded Commercial Agency v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E.2d 486 (1968).

Application to Building and Loan Associations.—

The provisions of this section concerning

shareholders' lists, and § 55-64, concerning voting lists, are applicable to savings and loan associations, and mandamus is expressly authorized by subsection (b) of this section to compel compliance. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-37.1. Form of records.—Any records maintained by a corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in

such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated print-out or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been. (1969, c. 751, s. 14.)

Editor's Note. — Session Laws 1969, c. 751, s. 47, makes this section effective Oct. 1, 1969.

§ 55-38. Examination and production of books, records and information.—(a) For the purpose of this section, a qualified shareholder is a person, natural or corporate, who shall have been a shareholder of record in a corporation, domestic or foreign, for at least six months immediately preceding his demand or who shall be the holder of record of at least five percent (5%) of its outstanding shares of any class, and the term shareholder includes a holder of a voting trust certificate to the extent of the shares represented by said certificate; provided that the personal representative of the estate of a deceased holder, or the guardian, committee, trustee or conservator of the estate of a ward, incompetent or missing person who is a holder, or a trustee in bankruptcy of a holder, or a receiver or liquidator of the estate or affairs of a holder, shall be deemed to be a qualified shareholder regardless of the period of time he has been a shareholder of record or the number of shares held by him.

(i) Provided that nothing in this section shall be construed to authorize a shareholder of a banking corporation to examine the deposit records or loan records of a bank customer, except upon order of a court of competent jurisdiction for good cause shown. (1901, c. 2, s. 49; Rev., s. 1179; C. S., s. 1172; G. S., s. 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11.)

Editor's Note.—The 1965 amendment added subsection (i).

The 1973 amendment, effective Oct. 1, 1973, added the proviso to subsection (a).

As the other subsections were not changed by the amendments, they are not set out.

For note on the 1965 amendments to this chapter, see 44 N.C.L. Rev. 1106 (1966).

The purpose of this section was to define with some definiteness the rights of inspection of shareholders and to impose some safeguards against fishing expeditions, especially by recent transferees. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

It Applies to Banks.—The 1965 amendment to this section shows that the General Assembly considered the provisions of this section applicable to banking corporations. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Stockholders Have Right to Inspect Books.—Since the stockholders are, in a sense, the beneficial owners of the corporate assets, and thus the persons primarily interested in seeing that the concern is

efficiently and profitably managed, it has generally been held that they are entitled to inspect the books and records in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors, at least where there are circumstances justifying some suspicion of mismanagement. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

But Fishing Expedition Is Not Authorized.—This section does not give a stockholder an absolute right of inspection and examination for a mere fishing expedition, or for a purpose not germane to the protection of his economic interest as a shareholder in the corporation. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

When Mandamus Proper.—The writ of mandamus should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-39. Appointment of provisional director. — (a) If the directors of a corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and if injury to the corporation is being suffered or is threatened by reason thereof, the superior court of the county where the registered office of the corporation is located may, notwithstanding any

provisions of the charter or bylaws of the corporation and whether or not an action is pending for an involuntary dissolution of the corporation, appoint a provisional director pursuant to this section.

(b) Action for such appointment may be filed by not less than one half of the directors or by the holders of not less than one third of the total outstanding shares of the corporation regardless of voting rights. Notice of such action shall be served upon the directors (other than those who have filed the action) and upon the corporation in the manner provided by law for service of a summons and complaint, and a hearing shall be held not less than 10 days after such service is effected. At such hearing all interested persons shall be given an opportunity to be heard.

(c) The provisional director shall be an impartial person, who is neither a shareholder nor a creditor of the corporation, nor related by blood or marriage to any of the other directors of the corporation, or to any judge of the court by which he is appointed. The provisional director shall have all the rights and powers of a director, and shall be entitled to notice of the meetings of the board of directors and to vote at such meetings, until he is removed by order of the court or by vote or written consent of the holders of a majority of the voting shares or holders of such higher number of voting shares as may be required under the charter or the bylaws for the election of directors. He shall be entitled to receive such compensation as may be agreed upon between him and the corporation, and in the absence of such agreement he shall be entitled to such compensation as shall be fixed by the court. (1973, c. 469, s. 13.)

Editor's Note.—Session Laws 1973, c. 469, s. 47, makes the act effective Oct. 1, 1973.

ARTICLE 5.

Corporate Finance.

§ 55-40. Authorized shares and restrictions thereon.

(c) Notwithstanding the provisions of subsection (a) (2) of this section, authorizing the issuance of shares entitling the holders thereof to noncumulative or partially cumulative dividends, noncumulative preferred shares of a class out of which shares were initially issued after June 30, 1957, and before October 1, 1969, shall be entitled to a dividend credit, as defined in this chapter, and until such dividend credit is fully discharged no dividend shall be paid to any shares that are subordinate to such preferred shares as to dividends.

(d) Unless the provisions of the charter or of resolutions fixing the characteristics of shares clearly indicate otherwise, if noncumulative shares, whether issued before or after the enactment of this chapter, are entitled to preferential payments on liquidation or dissolution, the amount of any then existing dividend credit shall be added to the said preferential payment.

(e) Except in cases falling within G.S. 55-52 (b) (4) or (5), no shares shall be hereafter authorized which purport to be redeemable at the election of the holder or which at the election of the holder purport to change his status to that of a creditor either at a designated time or upon a designated contingency. Nothing herein shall invalidate mandatory sinking fund requirements for the application of net earnings to the redemption of shares. This subsection shall not apply to building and loan associations or to land and loan associations. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C. S., s. 1156; 1921, c. 116, s. 1; 1923, c. 155; C. S., s. 1167(a); 1925, c. 118, ss. 2, 2a; c. 262, s. 1; 1939, c. 199; 1949, c. 929; G. S., ss. 55-61, 55-73; 1953, c. 822, ss. 1, 3; 1955, c. 1371, s. 1; 1969, c. 751, ss. 15-17.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote subsections (c) and (d) and inserted "(4) or" near the beginning of subsection (e).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 55-43. Subscriptions for shares.

(e) No preincorporation or post-incorporation subscription for shares shall contain provisions or be obtained upon oral or written representations that the payment of the shares subscribed is to be made out of subsequent earnings of the corporation or, except in a subscription by an employee, that the corporation (other than an investment company in cases within G.S. 55-52 (b) (5) or a building and loan association) will subsequently repurchase the shares, or that the subscribed shares are entitled to any advantage or preference over other shares of the same class or series; provided, that nothing herein shall invalidate the provisions of written agreements falling within G.S. 55-52 (b) (4). Any such provision or representation, or any oral condition purporting to qualify a written subscription, shall not be a defense against enforcement of the subscription or be grounds for rescission or for any other remedy against the corporation by the subscriber, but any promoter or agent of the corporation making or participating in making any such representation shall be liable to any subscriber for any loss resulting from reliance thereon, and any officer or director of a corporation who accepts a subscription which contains such provisions or which he knows was induced by such representations shall be similarly liable.

(1969, c. 751, s. 18.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added the proviso at the end of the first sentence of subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 55-44.1. Rights of holders of debt securities.—In addition to any rights otherwise lawfully conferred, the charter of the corporation may confer upon the holders of any bonds, debentures or other debt obligations issued or to be issued by the corporation any one or more of the following powers and rights upon such terms and conditions as may be prescribed in the charter:

- (1) The power to vote on any matter either in conjunction with or to the full or partial exclusion of its shareholders.
- (2) The right to inspect the corporate books and records.
- (3) Any other rights concerning the corporation which its shareholders have or may have.

Any such power or right shall not be diminished, as to bonds, debentures or other obligations then outstanding, except by an amendment of the charter approved by the vote or written consent of the holders of a majority in principal amount thereof or such larger percentage as may be specified in the charter. (1969, c. 751, s. 19.)

Editor's Note. — Session Laws 1969, c. 751, s. 47, makes this section effective Oct. 1, 1969.

§ 55-45. Sale of shares and options to employees.

(c) Repealed by Session Laws 1973, c. 469, s. 14.
(1973, c. 469, s. 14.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, repealed subsection (c), relating to issuing shares or granting options for shares when it is planned that 10% or

more of such shares are to go to directors or dominant shareholders.

As the other subsections were not changed by the amendment, they are not set out.

§ 55-46. Consideration for shares.—(a) Shares of a corporation shall not be issued as fully or partly paid nor shall treasury shares be disposed of except for:

- (1) Money or property, tangible or intangible, received by, or inuring to the benefit of, the corporation, or

- (2) Labor or services actually rendered to the corporation, or for its benefit in its organization or reorganization, or
- (3) Shares, securities or other obligations of the corporation actually surrendered, cancelled or reduced, or
- (4) Satisfaction of accrued dividends or dividend credits that have arisen with respect to preferred shares, or
- (5) Amounts transferred from surplus to stated capital.

(b) Neither promissory notes nor other obligations of a subscriber or purchaser, including any endorsement or guaranty or any obligation of the corporation, shall constitute payment or part payment to a corporation for its shares. An agreement of a person to perform future services as the consideration for shares shall not constitute payment prior to the performance of such services.

(1969, c. 751, s. 20; 1973, c. 469, ss. 15, 45.2.)

Editor's Note.—

The 1969 amendment substituted "received by, or inuring to the benefit of," for "actually received by" in subdivision (1) of subsection (a).

The 1973 amendment, effective Oct. 1, 1973, inserted a comma following "cor-

poration" in subdivision (2) of subsection (a) and substituted "payment" for "such a person a shareholder" near the end of subsection (b).

As the rest of the section was not changed by the amendments, only subsections (a) and (b) are set out.

§ 55-47. Determination of stated capital.

(b) A corporation shall have a stated capital, which except as reduced in accordance with this Chapter, shall be an amount in dollars equal to the sum of:

- (1) The aggregate par value of all shares having par value which have been issued from time to time, and
- (2) The entire amount of the agreed consideration received or to be received by the corporation for all shares without par value which have been issued from time to time, except such portion thereof as the board of directors prior to or at the time of issuance of such shares designates as paid-in surplus and such portion thereof as may be entered as earned surplus as permitted by G.S. 55-49(k), and
- (3) Such amounts, not included in subdivision (1) or (2) of this subsection as are transferred from surplus to stated capital upon declaration of a share dividend, and
- (4) Such amounts as are transferred from surplus to stated capital represented by shares without par value by resolution of the board of directors without declaration of a share dividend.

(1973, c. 469, s. 16.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, inserted "and such portion thereof as may be entered as earned surplus as permitted by G.S. 55-49(k)" near the end of subdivision (2) of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 55-49. Surplus, net profits and valuation of assets.

(d) Earned surplus is the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses, including gains and losses realized from the disposition or destruction of fixed assets (but not including unrealized appreciation in the value of any assets), from the date of incorporation, after deducting subsequent distributions to shareholders and transfers to stated capital and to capital surplus to the extent that such distributions and transfers are made out of earned surplus, and after adding all transfers made from capital surplus as permitted by subsection (i) of this section, all computed in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(h) : Repealed by Session Laws 1969, c. 751, s. 45, effective October 1, 1969.

(k) Whenever two or more corporations are consolidated or merged, or whenever a corporation purchases all or substantially all of the outstanding shares or assets of another corporation as a going concern and pays all or substantially all the purchase price by the issuance of shares of the purchasing corporation, or whenever a corporation is reorganized, the earned surplus appearing on the books of the constituent or merged or purchased corporation or corporations or on the books of a corporation prior to reorganization may, to the extent that it is not capitalized, be entered as earned surplus on the books of the resultant or purchasing or reorganized corporation.

(1969, c. 751, ss. 21, 45; 1973, c. 469, s. 17.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote subsection (d) and repealed subsection (h), which related to the vote required for a transfer from earned surplus to capital surplus.

The 1973 amendment, effective Oct. 1, 1973, inserted "or substantially all" and

"outstanding shares or" and made a change in punctuation near the beginning of subsection (k).

As the other subsections were not changed by the amendments, they are not set out.

§ 55-50. Dividends in cash or property.

(d) Subject to any provisions contained in its charter, for the purpose of paying a dividend out of earned surplus or net profits as permitted by subsection (a) of this section, a corporation engaged in the business of exploiting natural resources, patents, copyrights, leaseholds, and other assets wasting in a similar manner, or engaged primarily in the liquidation of specific assets, may compute its earned surplus or net profits derived from such exploitation or liquidation without taking into consideration the depletion or amortization of such assets resulting from lapse of time or from consumption, liquidation, or exploitation of such assets. If a dividend is paid from a source so computed, the corporation shall make the disclosure required by subsection (9) of this section.

(f) Partly paid shares are entitled to participate in dividends on the basis of the percentage of the consideration actually received by the corporation thereon, unless the charter or subscription agreement provides for lesser dividend payments.

(g) Concurrently with the payment of a dividend the corporation shall disclose to the shareholders receiving the same the source from which the dividend is paid if it is paid:

- (1) Otherwise than out of earned surplus, or
- (2) Out of earned surplus if within one year prior to the dividend payment a deficit in the earned surplus account has been reduced or eliminated as permitted by G.S. 55-49 (i), or
- (3) Out of earned surplus or net profits computed without deduction for depletion of natural resources.

(h) The provisions of the foregoing subsections shall not apply to banks, insurance companies, and investment companies registered under the Investment Company Act of 1940.

(i) : Repealed by Session Laws 1969, c. 751, s. 45, effective October 1, 1969.

(l) As used in this subsection, net profits shall mean such net profits as can lawfully be paid in dividends to a particular class of shares after making allowance for the prior claims of shares, if any, entitled to preference in the payment of dividends, but in the determination of such profits the provisions of subsection (d) of this section shall not apply. If during its immediately preceding fiscal period a corporation having less than 25 shareholders on the final day of said period has not paid to any class of shares dividends in cash or property amounting to at least one third of the net profits of said period allocable to that class, the holder or holders of twenty percent (20%) or more of the shares of that class may, within four months after the close of said period, make written demand upon the

corporation for the payment of additional dividends for that period. After a corporation has received such a demand, the directors shall, during the then current fiscal period or within three months after the close thereof, either (i) cause dividends in cash or property to be paid to the shareholders of that class in an amount equal to the difference between the dividends paid in said preceding fiscal period to shareholders of that class and one third of the net profits of said period allocable to that class, or in such lesser amount as may be demanded, or (ii) give notice pursuant to subsection (m) of this section to all shareholders making such demand. A corporation shall not, however, be required to pay dividends pursuant to such demand insofar as (i) such payment would exceed fifty percent (50%) of the net profits of the current fiscal period in which such demand is made, or (ii) insofar as the net profits are being retained to eliminate a deficit, or (iii) insofar as the directors of the corporation can show that its earnings are being retained to meet the reasonable anticipated needs of the business and that such retention of earnings is not inequitable in light of all the circumstances. Upon receipt of such a demand a corporation may elect to treat any dividend previously paid in the current fiscal period as having been paid in the preceding fiscal period, in which event the corporation shall so notify all shareholders. If a dividend is paid in satisfaction of a demand made in accordance with this subsection it shall be deemed to have been paid in the period for which it was demanded, and all shareholders shall be so informed concurrently with such payment.

(m) Upon receipt of a demand from the holders of twenty percent (20%) or more of the shares of any class of shares pursuant to subsection (l) of this section, the corporation receiving such demand may, during the then fiscal period or within three months after the close thereof, given [give] written notice to each shareholder making such written demand that the corporation elects to redeem all shares held by such shareholder in lieu of the payment of dividends as provided in subsection (l) of this section and shall pay to such shareholder the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice. A shareholder receiving such notice shall thereafter be entitled to receive the fair value of his shares, subject only to the surrender by him of his certificate representing his shares and to the provisions of G.S. 55-52, which value shall be determined and paid as follows:

- (1) If within 30 days after the date upon which a shareholder becomes entitled to payment for his shares under this subsection, the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.
- (2) If within the such 30-day period the shareholder and the corporation do not agree as to the value of the shares, the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to

such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. Upon payment of the judgment the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

Shares acquired by a corporation pursuant to payment of the agreed value thereof or to payment of the judgment entered therefor, as in this subsection provided, may be held and disposed of by the corporation as in the case of other treasury shares. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., ss. 1191, 1192; C. S., ss. 1178, 1179; 1927, c. 121; 1933, c. 354, s. 1; G. S., ss. 55-115, 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 16; 1965, c. 726; 1969, c. 751, ss. 22, 45; 1973, c. 469, ss. 18-20; c. 683.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote subdivision (2) of subsection (g) and repealed subsection (i), which had been amended in 1965 and related to payment of additional dividends upon demand of the stockholders in certain circumstances.

The first 1973 amendment, effective Oct. 1, 1973, rewrote the first sentence of subsection (d), substituted "the charter or subscription agreement provides for lesser dividend payments" for "otherwise provided in the charter or subscription agreement" at the end of subsection (f) and added subsections (l) and (m). New subsections (l) and (m) reenact the concept previously found in subsection (i), which was repealed in 1969.

The second 1973 amendment deleted "and" preceding "insurance" and added the language beginning "and investment companies" in subsection (h).

As the other subsections were not changed by the amendments, they are not set out.

For note on the 1965 amendments to this chapter, see 44 N.C.L. Rev. 1106 (1966).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market for his stock. *Dowd v Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 55-52. Acquisition by a corporation of its own shares.

(b) Subject to the provisions of subsection (e) of this section, a corporation may, by action of its board of directors, purchase and pay for its shares, or redeem such shares if redeemable, regardless of any impairment of stated capital, in the following cases:

- (1) To collect, settle, compromise or release in good faith a debt of or claim against any shareholder or subscriber of its shares;
- (2) To eliminate fractional shares or to avoid their issuance;
- (3) To satisfy claims of dissenting shareholders entitled to payment for their shares under the provisions of G.S. 55-113;
- (4) To perform its obligation or exercise its right to purchase shares of an employee or former employee under a written agreement relating to the employment, or to perform its obligation or exercise its right under

a written agreement to purchase shares of a deceased or disabled shareholder upon death or disability.

(5) If the corporation is organized to engage in the business of investing in securities and is engaged in no other business, to perform its agreement to repurchase its shares, at prices substantially equivalent to their proportionate interests in the assets of the corporation;

(6) Subject also to the provisions of subsection (f) of this section, to acquire for retirement, at prices not exceeding their redemption price, its shares that are subject to redemption.

(c) Subject to the provisions of subsections (e) and (f) of this section, a corporation may, by the action of its board of directors, purchase and pay for its shares, but only out of surplus and only in the following cases:

(1) If an offer is made to purchase pro rata from all its shareholders or all of a class of shareholders.

(2) From any shareholder shares which at the time are listed on an organized securities exchange.

(3) From any shareholder of any class, if the board of directors shall have obtained authorization so to purchase, within a period of one year preceding the purchase, by vote of a majority of the shares of the corporation entitled to vote after full disclosure to the holders of all such shares of the specific purpose of the proposed purchase, together with a statement of the number and class of shares proposed to be purchased. Such vote shall not be required for each specific purchase, provided the total number of shares purchased from any class shall not exceed the maximum number of shares of that class authorized to be purchased.

(4) From any shareholder in the exercise of the corporation's right to purchase the shares pursuant to restrictions upon the transfer thereof.

(5) In connection with stabilizing operations authorized by the Securities and Exchange Commission or other regulatory authority.

(6): Repealed by Session Laws 1969, c. 751, s. 45, effective October 1, 1969.

(d) A corporation may acquire shares issued by a parent corporation by purchase from such parent corporation, gift, bequest, merger, consolidation, distribution of the assets of the parent or another corporation or otherwise, but not by purchase of the outstanding shares of the parent.

(1967, c. 1163; 1969, c. 751, ss. 23-27, 45.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote subdivision (4) of subsection (b), subdivisions (1), (2), and (3) of subsection (c), repealed former subdivision (6) of subsection (c), which had been previously amended in 1967 and which related to purchase of shareholder shares listed and

traded on a securities exchange regulated or supervised by the United States government and shares in a corporation subject to the Securities Act of 1933. The amendment also rewrote subsection (d).

As the other subsections were not changed by the amendments, only subsections (b), (c) and (d) are set out.

ARTICLE 6.

Shareholders.

§ 55-53. Liability of shareholders arising from acquisition of shares.

(f) Every original holder of watered shares or of shares not fully paid as agreed shall continue liable thereon to the corporation notwithstanding any transfer of them in good faith without knowledge or notice that they were watered shares or shares not fully paid as agreed or if he acquired them from a transferor similarly such shares. A transferee of such shares shall not be liable thereon if he acquired free from liability. The burden of proof that the transferee did not so acquire the

shares shall be upon the adverse party. No prior holder of such shares can improve his position by taking from a later holder who is free from liability.

(1969, c. 751, s. 28.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, added the last sentence of subsection (f).

As the rest of the section was not changed by the amendment, only subsection (f) is set out.

§ 55-55. Shareholders' derivative actions. — (a) An action may be brought in this State in the right of any domestic or foreign corporation by a shareholder or holder of a beneficial interest in shares of such corporation; provided that the plaintiff or plaintiffs must allege, and it must appear, that each plaintiff was a shareholder or holder of a beneficial interest in such shares at the time of the transaction of which he complains or that his shares or beneficial interest in such shares devolved upon him by operation of law from a person who was a shareholder or holder of a beneficial interest in such shares at such time.

(b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

(c) Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the shareholders or any class or classes thereof, or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such shareholders or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action.

(d) If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

(e) In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action. (1973, c. 469, s. 12.)

Editor's Note. — Session Laws 1973, c. 469, s. 47, makes the act effective Oct. 1, 1973.

§ 55-56. Preemptive rights.

(c) Unless otherwise stated in the charter, there shall be no preemptive rights to acquire:

- (1) Shares issued within one year or to be issued pursuant to subscriptions accepted within one year, after the filing of the articles of incorporation, or
- (2) Shares issued or to be issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business, or
- (3) Shares released from preemptive rights by vote of two thirds of the shares entitled to such preemptive rights, or
- (4) Shares sold or agreed to be sold to employees or options for shares granted to employees as provided in G.S. 55-45, or
- (5) Shares issued or to be issued as a share dividend, or

- (6) Shares issued or to be issued to satisfy conversion rights or option rights theretofore granted by the corporation, or
- (7) Shares with respect to which the notice required by subsection (g) of this section has been given but which have not been purchased or subscribed within the prescribed time and which are thereafter sold or optioned to any other person or persons at a price no lower than and upon the other terms and conditions stated in such notice.

(g) The holders of shares entitled to preemptive rights under the charter or under this section shall be given written or printed notice briefly describing the shares with respect to which such rights exist and the period of time (not less than 15 days) within which and the terms and conditions, including the price, upon which such rights may be exercised. Such notice shall be delivered to each such holder, either personally or by mail, not less than 20 or more than 180 days prior to the expiration of the stated period within which such rights may be exercised. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the holder at his address as it appears on the record of shareholders of the corporation, with postage thereon prepaid. (1955, c. 1371, s. 1; 1969, c. 751, ss. 29-32.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, substituted "to acquire" for "with respect to" near the beginning of subsection (c), rewrote subdivision (1) of subsection (c), added subdivi-

sion (7) of subsection (c) and added subsection (g).

As the rest of the section was not changed by the amendment, only subsections (c) and (g) are set out.

§ 55-57. Share certificates.

Cross reference.—See § 25-8-405 which, under certain circumstances, requires a

corporation to issue a replacement certificate.

§ 55-59. Recognition of acts of record owners of shares or other securities.

Editor's Note.—

For article on joint ownership of corporate securities in North Carolina, see 44

N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

§ 55-60. Closing of transfer books and fixing record date.

(b) In lieu of closing the stock transfer books, the bylaws, or in the absence of an applicable bylaw, the board of directors may fix in advance a date as the record date for any such determination of shareholders, such date in any case to be not more than 60 days and, in case of a meeting of shareholders, not less than 10 full days immediately preceding the date on which the particular action, requiring such determination of shareholders, is to be taken.

(1973, c. 469, s. 45.1.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, substituted "60" for "fifty" near the middle of subsection (b).

As the rest of the section was not changed by the amendment, it is not set out.

§ 55-63. Irregular meetings; action without meetings.

(c) Any action which, under any provision of this chapter, is required or permitted to be taken at a meeting of the shareholders, may be taken without a meeting if consent in writing, setting forth the action so taken, shall be signed by all of the persons who would be entitled to vote upon such action at a meeting and filed with the secretary of the corporation as part of the corporate records, whether done before or after the action so taken. Such consent shall have the same force and effect as a unanimous vote of shareholders, and may be stated as such in any certificate or document filed with the Secretary of State under this chapter. (1955, c. 1371, s. 1; 1969, c. 751, s. 33.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, substituted "is re-

quired or permitted to" for "may" near the beginning of the first sentence of subsec-

tion (c) and added, at the end of the same sentence, "whether done before or after the action so taken."

As subsections (a) and (b) were not changed by the amendment, they are not set out.

§ 55-65. Quorum of shareholders.—(a) Unless otherwise provided in this Chapter or in the charter or in a bylaw adopted by the shareholders, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one third of the outstanding shares entitled to vote.

(1973, c. 469, s. 21.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, substituted "a bylaw" for "bylaws" near the beginning of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 55-66. Votes required.—(a) A majority of the shares voted at a meeting of shareholders, duly held and at which a quorum is present, shall be sufficient to take or authorize action upon any matter which may properly come before the meeting, unless more than a majority is required by this Chapter or by the charter or a bylaw adopted by the shareholders.

(b) Except where other provisions of this Chapter expressly make this subsection inapplicable, any corporation may by its charter or a bylaw adopted by its shareholders require for any purpose the concurrence of a greater proportion of the votes of any class or classes of shares than required by this Chapter for such purpose.

(c) Any provision in the charter or bylaws prescribing the vote required for any purpose as permitted by this section may not itself be amended by a vote less than the vote therein prescribed. (1955, c. 1371, s. 1; 1973, c. 469, s. 22.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, substituted "a bylaw" for "bylaws" near the end of subsection (a).

tion (a), inserted "or a bylaw adopted by its shareholders" in subsection (b) and added subsection (c).

§ 55-67. Voting of shares.

(b) Except as otherwise provided in this subsection, shares of its own stock owned by a corporation, directly or indirectly, through a subsidiary corporation or otherwise, shall not be voted and shall not be counted in determining the total number of shares entitled to vote.

Notwithstanding any other provisions in this chapter, shares of its own stock held by a corporation or by its subsidiary corporation in a fiduciary capacity shall not be voted in the election of directors and shall not be counted in determining the total number of shares entitled to vote in the election of directors if such corporation is the sole fiduciary, unless the instrument or court order establishing the fiduciary relationship provides that such shares may be voted as directed by some person other than the fiduciary and unless such person actually directs how such shares shall be voted; but if such corporation is not the sole fiduciary, then such shares may be voted in the election of directors by the other fiduciary or fiduciaries in accordance with the provisions of G.S. 55-69, and such shares shall be counted in determining the total number of shares entitled to vote in the election of directors. In all other matters, shares of its own stock held directly or indirectly by a corporation or through a subsidiary thereof as sole fiduciary or as a cofiduciary may be voted by the registered owner or owners, unless the instrument creating the fiduciary relationship provides otherwise.

(c) Except where some inconsistent agreement exists for choosing directors, valid under the provisions of G.S. 55-73, directors shall be elected by a plurality of the votes cast and at each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares standing of record in his name for as many persons as there are directors to be elected and for whose election he has a right to vote, or

to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such candidates. This right of cumulative voting shall not be exercised unless some shareholder or proxy holder announces in open meeting, before the voting for directors starts, his intention so to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of shares present in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon. Stockholders in any corporation now in existence under a charter which does not grant the right of cumulative voting may not exercise this right of cumulative voting when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is no stockholder who owns or controls more than one fourth of the voting stock of such corporation. Shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C. S., s. 1173; 1945, c. 635; G. S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote subsection (b) and inserted "directors shall be elected by a plurality of

the votes cast and" near the beginning of subsection (c).

As subsection (a) was not changed by the amendment, it is not set out.

§ 55-68. Proxies.

(b) A proxy is not valid after the expiration of 11 months from the date of its execution unless the person executing it specifies therein the length of time for which it is to continue in force, or limits its use to a particular meeting, but no proxy, whether or not designated as irrevocable as permitted by subsection (g) of this section, shall be valid after 10 years from the date of its execution, unless renewed or extended at any time before its expiration for not more than 10 years from the date of such renewal or extension.

(c) Any proxy duly executed is not revoked, and continues in full force and effect, until an instrument revoking it, or a duly executed proxy bearing a later date, is filed with the secretary of the corporation. A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted or the authority is exercised, written notice of the death or incapacity is given to the corporation. Notwithstanding that a valid proxy is outstanding the powers of the proxy holder are suspended, except in the case of a valid proxy which is designated as irrevocable as permitted by subsection (g) of this section, if the person executing the proxy is present at the meeting and elects to vote in person.

(f) A proxy shall be irrevocable only when it clearly indicates that it is to be irrevocable and is held by any of the following or by a nominee of any of the following:

- (1) A pledgee of the shares which are the subject of the proxy; or
- (2) A person who has purchased or contracted to purchase the shares which are the subject of the proxy; or
- (3) A creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of a proxy, if such proxy specifically states that it was given in consideration of such extension or continuation of credit, and sets forth the amount of, and the name of the person extending or continuing, credit; or
- (4) A person who has contracted to perform services for the corporation under a contract which requires a proxy, if the proxy states that it was given

in consideration of the contract, the name of the person, and the period of the contract; or

- (5) A person, including an arbitrator, designated by or under a shareholders' agreement permitted by G.S. 55-73.

Any such proxy shall become revocable after the pledge is redeemed, or the contract of purchase has been performed and the purchaser has become a shareholder of record, or the debt of the corporation is paid, or the period of the contract has been terminated, or the agreement permitted by G.S. 55-73 has terminated.

(g) A proxy may be revoked, notwithstanding a provision making it irrevocable, by a purchaser of shares without knowledge of the existence of such provision, unless notice of the proxy and of its irrevocability plainly appears on the face or back of the certificate representing such shares.

(h) The foregoing provisions shall be applicable to proxies given by the holders of a corporation's bonds, debentures or other obligations where a right to vote is conferred upon such holders by the charter as permitted by G.S. 55-44.1. (1955, c. 1371, s. 1; 1959, c. 1316, s. 24; 1973, c. 469, ss. 23-25.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, substituted "designated as irrevocable as permitted by subsection (g) of this section" for "coupled with an interest or otherwise irrevocable by law" and inserted "before its expiration" in subsection (b), substituted "designated as irrevocable as permitted by subsection (g) of this

section" for "by law irrevocable and which states on its face that it is irrevocable" in the third sentence of subsection (c) and added subsections (f), (g) and (h).

Only the subsections amended or added by the amendment are set out.

Applied in *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-69. Voting by corporations, pledgees, life tenants, fiduciaries and coowners.

Vote of One Trustee Is Act of All Trustees.—Under North Carolina law, the vote of one trustee ordinarily is the act of all the trustees where the trust owns shares of

corporate stock. *Fulk & Needham, Inc. v. United States*, 411 F.2d 1403 (4th Cir. 1969).

§ 55-71. Proceeding to determine validity of election or appointment of directors or officers.

Applied in *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-72. Voting trust.

(c) Notwithstanding the provisions of this section or of G.S. 55-59, the holders of record of the voting trust certificates shall have the same rights as if they were shareholders of record with respect to voting upon any amendment of the charter, amendment of the bylaws, reduction of stated capital, sale of the entire assets, merger, consolidation or dissolution. For this purpose the trustees, upon timely and adequate information and requests from the corporation, shall prepare and furnish the corporation with a list of the trust certificate holders, which shall conform substantially to the requirements of this Chapter relating to voting lists of shareholders, and the corporation shall send all proper notices, maintain and make available the said list for inspection and make all appropriate arrangements to permit the trust certificate holders to vote in person or by proxy at the meeting in question as if they were shareholders of record. This subsection (c) shall not apply to any voting trust initially created on or after October 1, 1973; and any voting trust created before that date may be amended by unanimous consent of the holders of record of the voting trust certificates to provide that this subsection (c) shall not thereafter be applicable to such voting trust.

(d) The trustee or trustees under a voting trust agreement shall, except to the extent otherwise provided by the agreement or subsection (c) of this section, have the right to vote upon and exercise any rights of dissent with respect to any charter

amendment, merger, consolidation, dissolution, sale of assets or reduction of stated capital of the corporation.

(e) At any time before the expiration of a voting trust agreement as originally created or as extended under this subsection, one or more holders of voting trust certificates may, by agreement in writing, extend the duration of such agreement, nominating the same or substitute trustee or trustees, for an additional period not to exceed 10 years from the date of such expiration. Such extension agreement shall not affect the rights or obligations of persons not parties to the extension agreement, and such persons shall be entitled to remove their shares from the trust upon the expiration of the voting trust agreement and promptly to have their share certificates reissued to them. The extension agreement shall comply with all provisions of this section applicable to the original voting trust agreement.

(f) The validity of a voting trust agreement, otherwise lawful, shall not be affected during a period of 10 years from the date of its creation or extension by the fact that by its terms it will or may last beyond such 10-year period. (1955, c. 1371, s. 1; 1963, c. 1233; 1973, c. 469, ss. 26-28.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, added the last sentence of subsection (c), rewrote subsection (d) and added subsections (e) and (f).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

For note entitled "Voting Trusts —

Should Trust Principles Apply to Close Corporations?" see 48 N.C.L. Rev. 342 (1970).

Cited in *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-73. Shareholders' agreements.—(a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in the exercise of any voting rights of shares held by the parties, including any vote with respect to directors, such shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with any procedure (including arbitration) specified in the agreement. Such agreement shall be valid and enforceable as between the parties thereto for a period not to exceed 10 years from the date of its execution; and in an action by a shareholder who is a party to such an agreement a court of competent jurisdiction may enjoin another party or parties to the agreement from voting his or their shares in violation thereof, or, if the corporation is made a party to the action, may set aside an election of directors or other action resulting from the voting of shares in violation of the agreement, and may grant such other or further relief as may appear appropriate under the circumstances for the enforcement of the agreement. Such agreement may be extended or renewed in like manner as a voting trust may be extended or renewed as provided by G.S. 55-72(e). Nothing herein shall impair the privilege of the corporation to treat the shareholders of record as entitled to vote the shares standing in their names, as provided in G.S. 55-59 nor impair the power of a court to determine voting rights as provided in G.S. 55-71.

(1973, c. 469, s. 29.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, rewrote subsection (a).

It would seem that the reference to § 55-72(e) in the next-to-last sentence of subsection (a) should be to § 55-72(d).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

For note entitled "Voting Trusts — Should Trust Principles Apply to Close Corporations?" see 48 N.C.L. Rev. 342 (1970). For comment on tax and corporate

aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

Agreement as to Voting Is Valid Unless There Is Fraud or Prejudice.—The Business Corporation Act clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner including agreements for the election of directors and corporate officers —is not invalid, unless it is inspired by

fraud or will prejudice the other stockholders. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

Agreements for Future Management Must Be "Otherwise Lawful."—Both this section and § 55-24 require that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Held Invalid.—Agreements providing for the future management and control of a corporation

which violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders or are made in consideration of a private benefit to the promisor, will be declared invalid. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. *Wilson v. McClenny* 262 N.C. 121, 136 S.E.2d 569 (1964).

ARTICLE 7.

Uniform Stock Transfer Act.

§§ 55-75 to 55-98: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Cross Reference.—For provisions of the Uniform Commercial Code as to investment securities. see §§ 25-8-101 to 25-8-406.

ARTICLE 8.

Fundamental Changes.

§ 55-100. Procedure to amend charter.

(b) After the issuance of any shares, including acceptance of any subscription for shares, amendments to the charter shall be made in the following manner:

- (1) The board of directors or the executive committee shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. In lieu thereof, a resolution setting forth a proposed amendment and requesting its submission to such a meeting may be approved in writing by such shareholders as would be entitled to a call of a shareholder's meeting pursuant to the provisions of G.S. 55-61(c).
- (2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given in or with the notice of the meeting to each shareholder of record entitled to vote thereon. If the amendment would give rise to a dissenter's right of payment for his shares under this Chapter, such notice shall contain a statement, displayed with a reasonable prominence, to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113 including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure of the notice to contain such a statement shall not invalidate the amendment.
- (3) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all the outstanding shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all the outstanding shares

of each class of shares entitled to vote thereon as a class and a majority of all the other outstanding shares entitled to vote thereon. If the charter prescribes a different quorum or requires more than the majority vote herein prescribed, either for all amendments or for a specific amendment, such charter provision can itself be amended or repealed only by the shareholders acting pursuant to any different quorum and greater vote so prescribed. An amendment to the charter which adds a provision for liquidation or dissolution of the corporation as permitted by G.S. 55-125(a)(3), or which changes or repeals such a provision, must be approved by the affirmative vote of the holders of all the outstanding shares of the corporation, whether or not otherwise entitled to vote, or by the holders of such lesser number of shares, but not less than the number required for a regular charter amendment, as may be specifically provided in the charter for adding, changing or repealing such a provision.

- (4) There shall be prepared and delivered to the Secretary of State articles of amendment complying with the provisions of G.S. 55-103.

(1973, c. 469, s. 30.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, rewrote the third sentence and added the fourth sentence of subdivision (3) of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 55-101. Class voting and objecting shareholders' rights on amendments.—(a) The holders of outstanding shares of a class shall be entitled as a class to vote, whether or not otherwise entitled to vote by the provisions of the charter, upon a proposed amendment which would:

- (1) Cancel or otherwise affect their rights to accrued dividends or dividend credits as defined in this chapter,
- (2) Reduce the dividend preference thereof,
- (3) Make noncumulative, in whole or in part, the dividends thereof which had theretofore been cumulative,
- (4) Reduce the redemption price thereof or make them subject to redemption when they are not otherwise redeemable,
- (5) Reduce any preferential amount payable thereon upon voluntary or involuntary liquidation,
- (6) Eliminate, diminish, or alter adversely conversion rights pertaining thereto,
- (7) Eliminate, diminish or alter adversely voting rights pertaining thereto, either directly or by increasing the relative voting rights per share of the shares of another class,
- (8) Diminish or alter adversely any options or rights of the holders thereof to purchase other shares of the corporation,
- (9) Change adversely any sinking fund provision relating thereto,
- (10) Rearrange the preferences of such outstanding shares so as to make them subject to the preferences of other than authorized shares, issued or unissued, as to distribution by way of dividends or otherwise,
- (11) Increase the rights and preferences of any other class of shares having equal or prior or superior rights or preferences,
- (12) Authorize a new class of shares having prior or superior rights or preferences or confer voting rights on holders of debt securities as permitted by the provisions of G.S. 55-44.1, or
- (13) Change the corporation into a nonprofit corporation or a cooperative organization.

(1969, c. 751, s. 36.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, added "or confer voting rights on holders of debt securities as permitted by

the provisions of G.S. 55-44.1, or" at the end of subdivision (12) of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

§ 55-106. Procedure for merger.—(a) One or more domestic corporations may merge into another corporation, hereinafter designated as the surviving corporation, pursuant to a plan of merger approved in the manner provided in this Chapter. All corporations which are parties to such merger are hereinafter designated collectively as the constituent corporations.

(b) The board of directors of each constituent corporation shall by resolution adopted by each such board, approve a plan of merger setting forth:

- (1) The name of each constituent corporation, and a designation of which constituent corporation is to be the surviving corporation.
- (2) The name which the surviving corporation is to have after the merger, which name may be that of any of the constituent corporations or any other available name permitted by this Chapter.
- (3) The terms and conditions of the proposed merger.
- (4) The manner and basis of converting the shares of each of the constituent corporations into shares or other securities or obligations of the surviving corporation, and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities or obligations of the surviving corporation, the cash, property, rights or shares or other securities or obligations of any other corporation which the holders of such shares are entitled to receive in exchange for such shares or upon their conversion and the surrender of the certificates evidencing such shares, which cash, property, rights or shares or other securities or obligations of any other corporation may be in addition to or in lieu of the shares or securities or obligations of the surviving corporation; or, if any constituent corporation is the wholly owned subsidiary of the surviving corporation and no cash or shares or other securities or obligations will be distributed, or issued upon conversion or cancellation of the shares of any such constituent corporation, a statement to that effect.
- (5) A statement of any changes in the charter of the surviving corporation to be effected by such merger.
- (6) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1055, c. 1371, s. 1; 1969, c. 751, s. 37; 1973, c. 469, s. 31.)

Editor's Note.—

The 1969 amendment added all of subdivision (4) of subsection (b) that follows "surviving corporation" where that phrase first appears near the beginning of the subdivision.

The 1973 amendment, effective Oct. 1, 1973, inserted "hereinafter designated as the surviving corporation" in the first sentence and added the second sentence of subsection (a), inserted "constituent" in the introductory paragraph of subsection (b), rewrote subdivision (1) and inserted "after the merger" and substituted "constituent corporations" for "corporations

involved in the merger" in subdivision (2) of subsection (b), and, in subdivision (4) of subsection (b), substituted "the constituent corporations" for "each merging corporation" and "any of the constituent corporations" for "any merging corporation" near the beginning and "constituent corporation" for "merging corporation" in two places near the end of the subdivision. The amendment also inserted "property, rights" in two places in subdivision (4) of subsection (b) and deleted "amount of" preceding "cash" the first time that word appears in the subdivision.

§ 55-107. Procedure for consolidation.—(a) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

- (1) The names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation. The name of the new corporation may be that of any of the corporations involved in the consolidation or any other available name permitted by this Chapter.
- (2) The terms and conditions of the proposed consolidation.
- (3) The manner and basis of converting the shares of each corporation into shares or other securities or obligations of the new corporation, and, if any shares of any consolidating corporation are not to be converted solely into shares or other securities or obligations of the new corporation, the cash, property, rights or shares or other securities or obligations of any other corporation which the holders of such shares are entitled to receive in exchange for such shares or upon their conversion and the surrender of the certificates evidencing such shares, which cash, property, rights or shares or other securities or obligations of any other corporation may be in addition to or in lieu of the shares or securities or obligations of the new corporation.
- (4) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this Chapter, except the names and addresses of the incorporators.
- (5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1955, c. 1371, s. 1; 1969, c. 751, s. 38; 1973, c. 469, s. 32.)

Editor's Note. — The 1969 amendment added all of subdivision (3) of subsection (b) that follows "the new corporation" near the beginning of the subdivision.

The 1973 amendment, effective Oct. 1, 1973, substituted "new corporation" for

"surviving corporation" and deleted "amount of" preceding "cash" near the middle of subdivision (3) of subsection (b) and inserted "property, rights" in two places in subdivision (3) of subsection (b).

§ 55-108.1. Mergers without approval of the shareholders of the surviving corporation.—(a) Unless otherwise provided in the charter or bylaws, no approval by shareholders of the surviving corporation shall be required for a merger if at the time of approval of the plan of merger by the board of directors of each of the corporations, domestic or foreign, who are parties thereto, the surviving corporation is the owner of all the outstanding shares of the other corporation, or corporations, domestic or foreign, who are parties to the merger, and the plan of merger does not provide for any changes in the charter of, or the issuance of any shares by, the surviving corporation.

(b) Unless otherwise provided in the charter or bylaws, no approval by shareholders of the surviving corporation shall be required for a merger if (i) the plan of merger does not provide for any changes in the charter of the surviving corporation, (ii) each share of the surviving corporation outstanding immediately prior to the merger becoming effective shall remain outstanding immediately after the merger as an identical share of the surviving corporation, and (iii) either no common shares of the surviving corporation and no shares, securities or obligations convertible into common shares are to be issued or delivered under the plan of merger, or the authorized unissued common shares or the treasury common shares of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed twenty percent (20%) of the common shares of the surviving corporation outstanding immediately prior to the effective date of the merger.

(c) In case of a merger under the provisions of this section, the articles of merger shall contain statements showing compliance with the conditions of this section, and, in lieu of statements required by G.S. 55-109(b) relating to the outstanding shares and the vote of shareholders of the surviving corporation, need only state the approval by its board of directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, divided the former provisions of this section into present subsections (a) and (c), added subsection (b), and substituted

"In case of a merger under the provisions of this section" for "and in such case" and inserted "required by G.S. 55-109(b)" and "the outstanding shares and" in subsection (c).

§ 55-109. Articles of merger or of consolidation. — (a) After the approval by the directors and shareholders to the extent required by G.S. 55-108 and G.S. 55-108.1, articles of merger or of consolidation shall be executed by each corporation and be filed as provided in G.S. 55-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent corporations have their registered offices. Certificates of merger or consolidation shall also be registered as provided in G.S. 47-18.1.

(1967, c. 823, s. 18; 1973, c. 469, s. 34.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in subsection (a).

The 1973 amendment, effective Oct. 1, 1973, substituted "directors and shareholders to the extent required by G.S. 55-

108 and G.S. 55-108.1" for "shareholders as required by G.S. 55-108" in the first sentence and added the second sentence of subsection (a).

As subsections (b) and (c) were not changed by the amendments, they are not set out.

§ 55-110. Effect of merger or consolidation.

(b) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subsection are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

(1967, c. 950, s. 1.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, added the last sentence in subsection (b).

As only subsection (b) was affected by the amendment, the rest of the section is not set out.

§ 55-111. Merger or consolidation of domestic and foreign corporations.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and, if after the merger or consolidation it transacts no business in this State, the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of the merger or consolidation or

out of any act or omission of such constituent corporation prior to or contemporaneous with the merger or consolidation, and process therein may be served as provided in G.S. 55-146 or G.S. 55-146.1.

(1973, c. 469, s. 35.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, inserted the language beginning "arising out of the merger" and ending "contemporaneous with the merger or consolidation" in subsection (c) and substituted, at the end of

subsection (c), "G.S. 55-146 or G.S. 55-146.1" for "G.S. 55-145."

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 55-112. Sale, lease, exchange and mortgage of assets.

Editor's Note.—For comment on the disposition of corporate assets, see 43 N.C.L. Rev. 957 (1965).

§ 55-113. Rights of objecting shareholders upon fundamental changes and certain exchanges of shares.

(e) If within the 30-day period mentioned in subsection (d) of this section the shareholder and the corporation do not agree as to the value of the shares the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. The fair value of any shares entitled to preference on liquidation shall in no event be found to be less than two thirds of the amount of the preference to which said shares would have been entitled on a voluntary liquidation on the date herein prescribed for determining fair value if under the corporate change giving rise to the preferred shareholder's rights of payment any shares junior thereto retain a participation in the corporation without payment for such retention, or if the participation received by them upon any payment for such retention is found to exceed in value the amount of the said payment. Upon payment of the judgment the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

(i) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving corporation is the owner of all the outstanding shares of the other corporation or corporations, domestic or foreign, participating in the merger and if such merger makes no changes in the relative rights of the shareholders of the surviving corporation. The provisions of this

section shall also not apply to the shareholders of the surviving corporation if their approval of the merger is not required, as provided in G.S. 55-108.1(b).

(j) A shareholder may not exercise his rights under this section as to less than all of the shares owned beneficially by him and with respect to which such rights exist. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner with respect to which the right of dissent exists. (1925, c. 77, s. 1; 1943, c. 270; G. S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added subsection (j). added the second sentence of subsection (i).

The 1973 amendment, effective Oct. 1, 1973, deleted "to the Supreme Court" following "right of appeal" near the end of the fourth sentence of subsection (e) and

As the rest of the section was not changed by the amendments, only subsections (e), (i) and (j) are set out.

§ 55-113.1. Fundamental changes in reorganization proceedings.—

(a) Whenever a plan of reorganization of a corporation has been or shall be confirmed by decree or order of a court of competent jurisdiction in proceedings for the reorganization of such corporation pursuant to the provisions of any applicable statute of the United States relating to reorganizations of corporations, the corporation may put into effect and carry out such plan and the decrees and orders of the court relative thereto and may take any proceeding and do any act provided in such plan or directed by such decrees and orders without further action by its directors or shareholders. Such action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed in the reorganization proceedings, or by designated officers of the corporation, or by a master or other representative appointed by the court, with like effect as if taken by unanimous action of the directors and shareholders of the corporation. In particular and without limiting the generality or effect of the foregoing, such corporation may:

- (1) Amend its charter or bylaws, or both, so long as the charter and bylaws as amended contain only such provisions as might be lawfully contained therein at the time of making such amendment;
- (2) Constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or any of the directors or officers then in office;
- (3) Make any change in its stated capital or surplus or in any or all of its outstanding shares or other securities, or cancel any or all of such outstanding shares or other securities;
- (4) Dissolve and liquidate;
- (5) Merge or consolidate;
- (6) Transfer all or part of its assets;
- (7) Change its registered office or registered agent, or both;
- (8) Authorize the issuance of bonds, debentures or other obligations of the corporation, whether or not convertible into shares of any class or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of any class, and fix the terms and conditions thereof.

(b) Any articles of amendment, statement of classification of shares, statement of change or registered office and registered agent, certificate of reduction of capital, restated charter, articles of merger, articles of consolidation, articles of dissolution, statement of revocation of dissolution, certificate of completed liquidation, or any other document appropriate to complete any action permitted by this section shall be executed and filed in accordance with the provisions of this Chapter on behalf of the corporation by such person or persons as may be authorized to take such action pursuant to subsection (a).

(c) No action taken under this section shall give rise to any rights under G.S. 55-113, except as provided in the plan of reorganization.

(d) No action authorized by this section shall be taken after the entry of a final decree in the reorganization proceedings closing the case and discharging the trustee or trustees, if any. (1973, c. 469, s. 38.)

Editor's Note.—Session Laws 1973, c. 469, s. 47, makes the act effective Oct. 1, 1973.

ARTICLE 9.

Dissolution and Liquidation.

§ 55-114. Dissolution and its effect.—(a) A corporation may be dissolved in any of the following ways:

- (1) Upon expiration of any period of duration to which the corporation is limited by its charter, by executing and filing in the office of the Secretary of State in accordance with the provisions of G.S. 55-4 articles of dissolution setting forth (i) the name of the corporation, (ii) the names and respective addresses of its officers and directors, and (iii) a statement of the expiration date presently contained in its charter;
- (2) By filing in the office of the Secretary of State articles of dissolution in voluntary proceedings for dissolution as prescribed in G.S. 55-116, 55-117 and 55-118;
- (3) By entry of a decree of dissolution by the superior court in involuntary proceedings for dissolution by the Attorney General, as prescribed in G.S. 55-122, or in proceedings to liquidate the assets and business of the corporation, as described in G.S. 55-125;
- (4) By suspension of its charter under the provisions of G.S. 105-230 when the time within which the corporation's rights might be restored under G. S. 105-232 has expired; however, the provisions for liquidation of corporate assets in such cases shall be those provided in G. S. 105-232 instead of those provided in this Chapter.

(1973, c. 469, ss. 39, 40.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, substituted "Upon" for "Automatically by" at the beginning of subdivision (1) of subsection (a) and added to that subdivision the language beginning "by executing and filing." The amendment also deleted "or in proceedings under G.S. 55-135" at the end of subdivision (3) of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Temporary Suspension of Charter.—

When a corporation's charter is suspended pursuant to § 105-230, the same may be reinstated within five years upon

payment of fees and taxes due the Revenue Department; and if the charter is not so reinstated within five years, then liquidation of corporate assets is as provided in § 105-232 rather than § 55-114 et seq. *Raleigh Swimming Pool Co. v. Wake Forest Country Club*, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Standing to Maintain Action on Contract.—A corporation whose articles of incorporation were suspended under § 105-230 for failure to pay taxes had standing under subsection (b) of this section to maintain an action to recover the amount due on a contract. *Raleigh Swimming Pool Co. v. Wake Forest Country Club*, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

§ 55-115. Extension of duration after expiration.

Cited in *Raleigh Swimming Pool Co. v. Wake Forest Country Club*, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

§ 55-119. Procedure after filing articles of dissolution.

Editor's Note.—

Session Laws 1973, c. 476, s. 193, effective July 1, 1973, amends this section by

substituting "Secretary of Revenue" for "Commissioner of Revenue."

§ 55-121. Completion of liquidation in voluntary dissolution proceedings.

Editor's Note.—Session Laws 1973, c. 476, s. 193, effective July 1, 1973, amends

this section by substituting "Secretary of Revenue" for "Commissioner of Revenue."

§ 55-125. Power of courts to liquidate and decree involuntary dissolution.

Showing Required under Subsection (a) (4).—When the power of the court in the exercise of its equitable jurisdiction is invoked to liquidate and decree involuntary dissolution under subsection (a) (4), there must be a showing that the liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation.—A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from

obtaining either a fair dividend or a fair market for his stock. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

Directors are Proper Parties to Shareholder's Suit.—Directors are proper parties to a suit to dissolve the corporation upon the complaint of one shareholder, even though no relief is sought against them personally. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

They May Be Joined or Become Parties on Own Application.—The implication in this section is that directors and other interested shareholders may be made, or, on their own application, may become parties to a complaining shareholder's action to liquidate and dissolve the corporation. Certainly the directors are not improper parties. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 55-125.1. Discretion of court to grant relief other than dissolution.—(a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order:

- (1) Canceling or altering any provision contained in the charter or the bylaws of the corporation; or
- (2) Canceling, altering, or enjoining any resolution or other act of the corporation; or
- (3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or
- (4) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders, such fair value to be determined in accordance with such procedures as the court may provide.

(b) Such relief may be granted as an alternative to a decree of dissolution, or may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate. (1973, c. 469, s. 41.)

Editor's Note.—Session Laws 1973, c. 469, s. 47, makes the act effective Oct. 1, 1973.

§ 55-127. Procedure in liquidation of corporation by court.

Applied in *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 55-129. Duties of officials as to decrees and orders concerning dissolution or charter amendment.—A court decree effecting or canceling a dissolution of a corporation or canceling or altering any provision contained in its charter, or a court order declaring liquidation completed shall contain a direction to the clerk of that court promptly to file one certified copy of such decree or order with the Secretary of State and also to file a certified copy thereof with the register of deeds of the county wherein the corporation has its registered office. The fees for the preparation, certificates, and filing of such decree or order shall be taxed as a part of the costs in the action. The register of deeds shall record and index the order or decree in the Record of Incorporations; promptly after the recordation, the register shall note the fact of recordation on the said copy and return it to the corporation or its representative. If the corporation or its representative cannot be located, the register may destroy the copy. (1955, c. 1371, s. 1; 1967, c. 823, s. 19; 1969, c. 965, s. 1; 1973, c. 469, s. 42.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in the first sentence and deleted "unless the decree or order was entered in that court" at the end of such sentence.

The 1969 amendment, effective July 1, 1969, added the third and fourth sentences.

The 1973 amendment, effective Oct. 1, 1973, inserted "or canceling or altering any provision contained in its charter" in the first sentence.

§ 55-130. Disposition of amounts due to unavailable shareholders and creditors.—Upon liquidation of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found, shall be reduced to cash and deposited with the clerk of the superior court of the county of the registered office of the corporation to be held three months for the persons respectively entitled thereto, as and when satisfactory evidence of their right to the same is furnished. After the clerk has held the unclaimed cash for the aforesaid period of three months, he shall pay such assets to the State Treasurer, to be held without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. (1947, c. 613; c. 621, s. 1; G.S., s. 55-132; 1955, c. 1371, s. 1; 1971, c. 1135, s. 4.)

Editor's Note.—The 1971 amendment, effective July 1, 1971, substituted "State Treasurer" for "University of North Carolina" in the second sentence.

For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

ARTICLE 10.***Foreign Corporations.*****§ 55-131. Right to transact business.****Editor's Note.**—

For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966). For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971). For article on "Foreign Corporation Laws: The Loss of Reason," see 47 N.C.L. Rev. 1 (1968).

Substituted Service Proper against Domesticated Foreign Corporation Wherever

Cause of Action Arose.—A foreign corporation which has complied with this article and has been duly authorized to do business in this State, may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Mere soliciting or procuring orders

through employees or agents, where such orders require acceptance without this State before becoming binding contracts, does not constitute "transacting business" in this State. *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Stated in Westarc Leasing Corp. v. Capital Sign Serv., Inc., 268 N.C. 601, 151 S.E.2d 204 (1966).

Cited in Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

§ 55-132. Powers of foreign corporation.

(b) A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death, except that a foreign corporation chartered under the banking laws of Georgia, South Carolina, Tennessee or Virginia or as a National Banking Association in any said states may act as testamentary trustee, or executor in this State if:

- (1) It has a bona fide capital of at least two hundred and fifty thousand dollars (\$250,000.00) actually paid in;
- (2) It is authorized to act in such fiduciary capacity in the state in which it is incorporated or if such foreign corporation be a national banking association in the state in which it has its principal place of business; and
- (3) Any bank or other corporation organized under the laws of this State or a national banking association having its principal place of business in this State is permitted by law to act in such fiduciary capacity in the state in which such foreign corporation seeking to act in this State is organized or in which it has its principal place of business if it is a national banking association without further showing or qualification other than that it is authorized to act in such fiduciary capacity in this State and upon compliance with the laws of such other state, if any, concerning service of process on nonresident fiduciaries.

Unless assets of the estate are to be removed from within the State of North Carolina, such foreign corporations seeking to act as testamentary trustee, or executor in this State, upon qualifying to act in such fiduciary capacity, shall not be required by law to give bond except as required of a resident corporate fiduciary in like circumstances. No officer, employee or agent of any such foreign corporation shall be eligible or entitled to serve as testamentary trustee, or executor in this State whether such officer, employee, or agent is a resident or a nonresident of this State if such officer, employee, or agent is acting as testamentary trustee, or executor on behalf of any such foreign corporation except when such foreign corporation itself shall be eligible to so serve.

A foreign corporation qualifying as testamentary trustee or executor under the provisions of this section shall appoint a process agent in the same manner as now provided under G.S. 28-186 in the case of nonresident executors. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C. S., s. 1180; G. S., s. 55-117; 1955, c. 1371, s. 1; 1969, c. 839.)

Editor's Note.—

The 1969 amendment added all of subsection (b) following the word "death" near the beginning of the subsection.

As subsection (a) was not changed by the amendment, it is not set out.

§ 55-137. Corporate name of foreign corporation.

(c) The corporate name shall not be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or any foreign corporation, whether for profit or not for profit, authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner prescribed in G.S. 55-12, except that the Secretary

of State may in his discretion issue a certificate of authority to a foreign corporation which has a corporate name the same as or similar to that of some other domestic corporation or foreign corporation authorized to transact business in this State:

- (1) If the Secretary of State finds, upon proof by affidavit or otherwise, that such corporations are not engaged in the same or similar businesses and that the public is not likely to be confused or deceived, and if, upon requirement by the Secretary of State in his discretion, such foreign corporation agrees in its application for certificate of authority to add to its corporate name in this State words indicating the state or country under the laws of which it is incorporated; or
- (2) If the foreign corporation agrees in its application for certificate of authority to do business in this State only under an assumed name that would be available for use in this State, in which event such corporation shall thereafter comply with all of the provisions of law, including the provisions of G.S. 66-68 through G.S. 66-71, relating to doing business under an assumed name and such assumed name shall be deemed to be the name of such foreign corporation in this State and shall be entitled to the same protection under this Chapter as if it were the name of such foreign corporation.

(e) The issuance of a certificate of authority to any foreign corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or of the common law; and the issuance of such certificate shall not be a defense to an action for violation of any such rights. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C. S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G. S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 27; 1969, c. 751, s. 40; 1971, c. 1093, s. 1; 1973, c. 469, s. 45.4.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote subsection (c).

The 1971 amendment inserted "under" in subdivision (2) of subsection (c).

The 1973 amendment, effective Oct. 1, 1973, added subsection (e).

As the rest of the section was not changed by the amendments, only subsections (c) and (e) are set out.

§ 55-138. Application for certificate of authority.—(a) A foreign corporation, in order to procure a certificate of authority to transact business in this State, shall make application therefor to the Secretary of State, which application shall set forth:

- (1) The name of the corporation and the state or country under the laws of which it is incorporated.
- (2) If the name of the corporation does not contain the word "corporation," "incorporated," "limited," or "company," or does not contain an abbreviation of one of such words, then the name of the corporation with the word or abbreviation which it elects to add thereto for use in this State; or if the corporation agrees under G.S. 55-137 (c) to add to its corporate name in this State words indicating its jurisdiction of incorporation or agrees to do business under an assumed name, then the name of the corporation with the words so added or the assumed name which name must contain the words or abbreviations required by this subdivision.
- (3) The date of incorporation and the period of duration of the corporation.
- (4) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated.
- (5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the corporation in this

State, and the name of its proposed registered agent in this State at such address.

- (6) The purpose or purposes of the corporation which it proposes to pursue in the transaction of business in this State.
- (7) The names and respective addresses of the directors and officers of the corporation.
- (8) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.
- (9) A statement of the aggregate number of issued shares itemized by classes, par value of shares, shares without par value, and series, if any, within a class.
- (10) A statement that, in consideration of the issuance of a certificate of authority to transact business in this State, the corporation appoints the Secretary of State of North Carolina as its agent to receive service of process, notice, or demand whenever the corporation fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office.

(b) Such application shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application. (1955, c. 1371, s. 1; 1957, c. 979, s. 8; 1969, c. 751, s. 41.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, added that part of subdivision (2) of subsection (a) that follows the semicolon.

Section Inapplicable Where Foreign Corporation Has Complied with Requirements for Domestication.—Where a foreign corporation has complied with the statutory

requirements for domestication it is not required to file with the Secretary of State the certificate prescribed by this section, nor is it required to notify the Secretary of State of its principal office in this State. *Aetna Cas. & Sur. Co. v. Petroleum Transit Co.*, 266 N.C. 756, 147 S.E.2d 229 (1966).

§ 55-142. Change of registered office or registered agent of foreign corporation.

(d) In lieu of the procedure set out in subsection (a) above, the location of the registered office of a foreign corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of each of the corporations recited in the certificate. The fee to be charged by the Secretary of State for the filing of such certificate shall be a fee of three dollars (\$3.00) for each corporation listed in said certificate. (1955, c. 1371, s. 1; 1957, c. 979, ss. 9, 10; 1965, c. 298, s. 2.)

Editor's Note.—

The 1965 amendment added subsection (d).

As only subsection (d) was affected by the amendment, the rest of the section is not set out.

For note on the 1965 amendments to this chapter, see 44 N.C.L. Rev. 1106 (1966).

§ 55-143. Suits against foreign corporations authorized to transact business in this State.

Editor's Note.—

Subsection (c) of this section changed the rule laid down in *Central Motor Lines, Inc. v. Brooks Transp. Co.*, 225 N.C. 733, 36 S.E.2d 271, 162 A.L.R. 1419 (1945); *Hamilton v. Atlantic Greyhound Corp.*, 220 N.C. 815, 18 S.E.2d 367 (1942); and *King v. Robinson Transfer Motor Lines, Inc.*, 219 N.C. 223, 13 S.E.2d 233 (1941). *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

Domesticated Foreign Corporation May Be Sued Like Domestic Corporation.—The policy of this section is to treat the foreign corporation which is authorized to transact business in this State just as a domestic corporation is treated, insofar as suability is concerned. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Secretary of State Becomes Process Agent if There Is No Registered Agent.—

If a foreign corporation fails to appoint or maintain a registered agent in this State, or whenever such agent cannot be found, then the Secretary of State becomes an agent upon whom process may be served. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Express consent to substituted service is required at the time the foreign corporation domesticates, and such express consent has been held to cure the constitutional difficulty presented by transitory causes of action. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Thus, Domesticated Foreign Corporation May Be Sued by Substituted Service on Transitory Cause of Action.—A foreign corporation which has complied with this article and has been duly authorized to do

business in this State, may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Whether or Not Suit Relates to Business Transacted in State.—This section sanctions a suit in this State against a foreign corporation authorized to transact business in this State by service on the registered agent, or on the Secretary of State if there is no such agent, whether or not it relates to business transacted in this State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

But Section Is Inapplicable to Undomesticated Foreign Corporations.—This section applies to service of process on a foreign corporation only in those instances in which the corporation has domesticated here, regardless of whether or not the cause of action arose in this State and regardless of whether the action relates to business transacted in this State, and this section has no application to a foreign corporation which has not domesticated here. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Substituted Service in Action against Such Corporation for Tort Committed outside State Is Unauthorized.—No statute in North Carolina authorizes service upon the Secretary of State in an action against an undomesticated foreign corporation doing business in this State or a tort committed outside this State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Cited in *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585 (1966); *Shew v. Royce Chem. Co.*, 5 N.C. App. 444, 168 S.E.2d 701 (1969).

§ 55-144. Suits against foreign corporations transacting business in the State without authorization.

Editor's Note.—

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971). For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965). For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

Section Preserves Rule as to Substituted

Service on Undomesticated Foreign Corporations.—The rule as to substituted service on foreign corporations which transact business in this State without domesticating is preserved by this section. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Such Corporation May Not Be Sued on Transitory Foreign Cause of Action.—A foreign corporation which has done business in the State without complying with the law may not be brought into court

on a transitory foreign cause of action. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

This Section Gives No Jurisdiction of Such Causes of Action.—This section provides no jurisdiction in this State for foreign transitory causes of action *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

The provisions of this section are not available for transitory foreign causes of action. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Thus, There Cannot Be Substituted Service on Such Corporation in Action on Foreign Tort.—If a foreign corporation, not domesticated in North Carolina, were transacting business in this State, it could not be brought into court in this State under this section by service of process upon the Secretary of State in an action based on a tort occurring in Virginia. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

No statute in this State authorizes service upon the Secretary of State in an action against an undomesticated foreign corporation doing business in this State for a tort committed outside this State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

While defendant was doing business in this State during the time its agent was here managing a domestic carrier, the cause of action did not arise out of business so transacted in this State, and therefore service of process under this section by service on the Secretary of State was a nullity. *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585 (1966).

Cause of Action Must Arise in This State for Substituted Service.—An action based upon substituted service on the Secretary of State may be maintained against an undomesticated foreign corporation only on causes arising within the State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

But Service Is Not Authorized in Every Case Where Cause of Action Arose in This State.—This section does not authorize service of summons upon the Secretary of State in all cases where the cause of action arose in this State. *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585 (1966).

And This Section Limits Such Service to Causes of Action from Business Transacted in State.—This section expressly limits substituted service upon the Secretary of State where the foreign corporation has not domesticated, to suits upon a cause

of action arising out of business transacted in this State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

This section applies only when the cause of action against a foreign corporation arises out of business conducted by it in this State, and therefore, when a transitory cause of action arises in another state, this section can have no application. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

For the service of process upon the Secretary of State to be valid and binding upon defendant, two things must exist, by reason of the express provisions of this section: (1) Defendant must have transacted business in this State, and (2) the cause of action here must have arisen out of such business. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Cause of Action Arising Out of Business Conducted in State Is Not Transitory.—

Where the defendant was conducting business in this State with the plaintiff and other residents of this State and maintained an office in this State for that purpose and where a substantial portion of plaintiff's cause of action arose out of such business, the cause of action is not a transitory one arising in another state but is local in nature. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Mere Fact of Personal Service Insufficient to Create Jurisdiction.—The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

There are three conditions precedent to valid service under this section, namely: (1) The foreign corporation must transact business in this State; (2) the foreign corporation must transact business in this State without first procuring a certificate of authority from the Secretary of State; and (3) there must be a cause of action arising out of such business. *Eppe v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

This section requires more "contacts," etc.—

This section concerns "foreign corporations transacting business in the State" and, therefore, necessarily seems to be more restrictive in its application than § 55-145, the latter section dealing with "foreign corporations not transacting business" in the State. The foreign corporation must

have more contacts with the forum state in order to come within the statutory limits of this section. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

More contacts with the forum State are required in order to come within the limits of this section than are required under § 55-145. *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

Effect of Change from, etc.—

In accord with original. See *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The present North Carolina statute was enacted after the landmark decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945), wherein the old jurisdictional tests of "consent," "presence," and "doing business" were discarded and a qualitative test of "minimum contacts" was established for determining the constitutional limits on a state court's jurisdictional reach. North Carolina's previous statute had used the phrase "doing business," and in July 1957 this was replaced with the present § 55-144 and its "transacting business" phraseology. In *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965), this present language was held to be more liberal than the previous "doing business." *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

The meaning of the expression "doing business in this State," as used in former § 55-38, is also accurate as to the meaning of "shall transact business in this State," as used in this section. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

What Constitutes Doing Business.—

In accord with 1st paragraph in original. See *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The business done by the corporation in this State must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. *Spartan Equip. Co. v. Air Place-*

ment Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Transacting business within the State is defined as the transaction within the State of some substantial part of a party's ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and must be of such a character as will give rise to some form of legal obligations. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

In *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965), "transacting business" was construed as activities in North Carolina which are "'substantial,' 'continuous and systematic,' and 'regular,' as distinguished from 'casual,' 'single' or 'isolated acts.'" *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Presence in the State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Same—Invocation of Benefits of Law of Forum.—A relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. *United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964).

Same—Continuity of Conduct.—

Where a foreign corporation has been continuously and systematically for several years doing business in North Carolina and exercising in this State some of the functions for which it was created, and has such substantial contacts within the State that the maintenance of a suit in personam does not offend traditional notions of fair play and substantial justice, it is proper to refuse to quash service of process. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965).

Same—Occasional Visits and Communications.—Occasional visits by an out of state car dealer to the regional office of the Chrysler Corporation in North Carolina, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and

occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

Same — Employment of Soliciting Agent.—

While the salesmen did some promotional work, and attempted to create good will for their company, and perhaps on occasions rendered engineering service or advice to customers, their principal and significant duties consisted of soliciting orders for acceptance at the home office and this did not constitute transacting business. *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Same—Single-Item Sales Contract Following Engineering Consultant Services.—

The facts amount to two intermittent acts: (1) The contract to supply engineering consultant services to a furniture manufacturer. The work was not shown to have been performed within the State of North Carolina; performance in that contract was completed at least a year prior to the events involved in the case at bar; and the action here in suit did not arise out of that consultant contract. (2) The negotiation of the single-item sales contract involved in the case at bar. These activities fall outside this section. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Same — Foreign Corporation with Licensees in State.—A foreign corporation which received substantial royalties from 14 of 23 licensees located in this State and which adopted a program of sending auditors into the State to examine the books and records of its licensees was engaged in the transaction of business in North Carolina. *Throwing Corp. of America v. Deering Milliken Research Corp.*, 302 F. Supp. 487 (M.D.N.C. 1969).

Same—Ownership or Control of Subsidiary Doing Business in State. — Generally, it has been held or recognized that the mere ownership or control by a foreign corporation through a majority stock ownership of the stock of another corporation which is doing business within a state, either resident or domesticated, does not, in and of itself, constitute doing business within the state by the foreign corporation for the service of process so as to subject it to the state's jurisdiction, where the foreign corporation is not created for the very purpose of holding such stock and the two corporations remain distinct enti-

ties. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Same—Transacting Business of Domestic Subsidiary in State.—Where a foreign corporation acquires and holds controlling stock interest in a domestic corporation, and comes into the state where the domestic corporation is created and doing business, and there itself by its officer or officers transacts business of the domestic corporation and manages and controls its internal affairs, then such foreign corporation is doing business within the domestic state and is subject to the jurisdiction of its courts. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Same—Appraisal Business.—Where defendant was in the appraisal business and was soliciting and performing appraisal work in North Carolina, it was thus transacting and performing in this State the business for which it was created. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Same—Question of Fact.—

It is to be distinctly understood that no all-embracing rule as to what is the meaning of "shall transact business in this State" has been formulated. This question must be determined largely according to the facts of each individual case rather than by the application of fixed, definite, and precise rules. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The validity of service of summons under this section, as well as the satisfaction of due process, must be largely determined by a factual evaluation of the nature and extent of the business of the defendant. *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Whether the type of activity conducted within the State is adequate to satisfy the "transacting business" requirements depends upon the facts of the particular case. *United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964).

The question of whether a company is transacting business within the State cannot be answered by applying a mechanical formula or rule of thumb, but only by ascertaining what is fair and reasonable and just in the circumstances. *United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964).

Findings of fact should be made so that it could be determined whether or not activities by the defendant in this State were "substantial," "continuous and sys-

tematic," and "regular," as distinguished from "casual," "single" or "isolated acts," and that defendant by such activities was transacting business in this State under the relevant rules of law and within the intent and meaning of this section. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

When Service on Secretary of State Is Sufficient.—If the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.—(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

- (1) Out of any contract made in this State or to be performed in this State; or
- (2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or
- (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or
- (4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

(1973, c. 469, s. 43.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, deleted "by a resident of this State or by a person having a usual place of business in this State" following "suit in this State" in the introductory paragraph in subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

For comment on jurisdiction over foreign corporations not transacting business in North Carolina, see 2 Wake Forest Intra. L. Rev. 1 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For note on personal jurisdiction over

The federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State legislature. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Cited in *Shew v. Royce Chem. Co.*, 5 N.C. App. 444, 168 S.E.2d 701 (1969); *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15 (1970); *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970); *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

foreign corporations based upon making a contract in North Carolina, see 49 N.C.L. Rev. 838 (1971).

Constitutionality of Subsection (a)(1).—A number of states have statutes similar to subsection (a)(1) of this section. These statutes generally provide that where the cause of action arises out of a contract with a foreign corporation, made in the forum state or to be performed in whole or in part in such state, an action in personam may be maintained in the forum state, upon substituted service of process. In no instance has such statute been declared unconstitutional. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15 (1970).

The jurisdiction created by this section pertains only to local actions and has no application to any cause of action arising outside the State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963); *Marshville Rendering*

Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

But Applies to Foreign Corporations Not Transacting Business in State.—This section governs jurisdiction over foreign corporations not transacting business in this State. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Foreign corporations are by this section made subject to local suits by residents of this State in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so "transacting business" as to be required to obtain a certificate of authority. *Atlantic Coast Line R.R. v. J. B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963); *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

By its terms, this section applies to foreign corporations not transacting business in North Carolina and so seems to be intended to take advantage of the liberal constitutional limits provided by the decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945). *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Subsection (a) of this section is applicable to foreign corporations which are not transacting business in North Carolina but who come within the purview of any one of the four specific and well-delineated areas listed therein. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15 (1970).

And Authorizes Personal Judgment.—Where a cause of action stated in a complaint or a cross action arises out of a transaction which falls within the terms of this section and service of process is had under § 55-146, the defendant is brought within the jurisdiction of the court for purposes of an in personam judgment. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

Upon a finding that an action grows out of a contract to be performed within the State of North Carolina, in personam jurisdiction of the corporate defendant is sustained. *Throwing Corp. of America v. Deering Milliken Research Corp.*, 302 F. Supp. 487 (M.D.N.C. 1969).

The federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State legislature. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Criteria for Subjection of Corporation to Suit. — It is evident that the criteria by

which the boundary line is marked between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968).

Sufficiency of Contacts and Manner of Service Present Question of Due Process.

—Whether a foreign corporation has sufficient contacts within the State to subject it to service of process in an action in personam, and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

Requirements of Due Process.—Due process requires only that, in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968); *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

A State court may acquire in personam jurisdiction over a nonresident defendant under principles established by the United States Supreme Court where the nonresident defendant has "minimum contacts" with the State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 233 (1957). The decision reached by the Supreme Court in the *International Shoe* case marked a substantial departure from the prior standards of "consent," "doing business" and "presence" which were used to measure the permissible extent of judicial power over corporations. The high-water mark was reached in the *McGee* case, where the United States Supreme Court, in a unanimous decision, held that the tests laid down in *International Shoe* had been met even though there was but a

single transaction which gave rise to the suit. *Goldman v. Parkland of Dallas, Inc.*, 1 N.C. App. 400, 173 S.E.2d 15 (1970).

The applicability of subsection (a)(1) of this section is consistent with the federal requirements of due process. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Where this section is applicable, the assumption of in personam jurisdiction of a defendant by the North Carolina court, pursuant to subsection (a) of this section, would not offend the due process clause of the Constitution of the United States. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

The assumption of in personam jurisdiction by a North Carolina court, pursuant to subsection (a)(1) of this section, does not offend the due process clause of the Constitution of the United States if the defendant has sufficient "minimum contacts" with the State. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

The legislature of this State, by the express words of this section authorizing such service on a foreign corporation when the contract was made in this State, sought to give to its courts the power to assert jurisdiction over nonresident defendants to the full extent permitted by the due process requirement. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Where defendant had agents residing in and working in North Carolina and shipped large quantities of its appliances into North Carolina with the reasonable expectation that they would be used in the homes of the people of this State and its sales contracts were accepted outside North Carolina, manifestly, therefore, upon the undisputed facts, the cause of action arises out of activities described in subsection (a)(3) of this section. The minimum contacts requirement was satisfied so that the due process clause was not offended by this subsection. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Where a contract is executed by plaintiff in North Carolina, accepted by defendant in another state, and is to be performed in North Carolina, subsection (a)(1) of this section is satisfied and the assumption of

jurisdiction does not offend the due process clause of the Constitution of the United States. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Where the foreign defendant was aware, or certainly should have been aware, that unless it fulfilled its contractual obligation, its activity in obtaining the release of the funds from this State would substantially affect the rights of creditors within North Carolina and the right of resident plaintiff to avoid liability for payment of the North Carolina debts of the foreign defendant's customer as imposed by the lien laws of this State, the exercise of jurisdiction under these circumstances appropriate under the statute do not violate the due process clause of the federal Constitution. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

To sustain jurisdiction in this State, even if the tort was committed in North Carolina, while the only acts of negligence on the part of the defendant are alleged to have been committed in South Carolina, would be offensive to the due process clause of the U.S. Constitution. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

First Amendment Considerations Are Relevant to Jurisdictional Question.—*New York Times Co. v. Conner*, 365 F.2d 567 (5th Cir. 1966), does not stand for the proposition that, because of the constitutional protection of the dissemination of ideas, a publisher may never be sued for libel in a state other than that of publication. Rather, Conner indicates that First Amendment considerations are a factor relevant to a determination of the jurisdictional question; and, the discussion of that factor in Conner must be viewed in its factual context. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

But First Amendment Considerations Are Minimized.—In a libel action against a national magazine publisher, the First Amendment was not totally disregarded in the context of the jurisdictional question under this section, but the consideration given it was minimized. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

In the jurisdictional context, the non-resident defendant publisher has the protection of the rights guaranteed to it by the due process clause of the Fourteenth Amendment, and to interject the First Amendment, with its full impact, into the discussion at this point would unnecessarily confuse an already complex issue. *Johnston v. Time, Inc.* 321 F. Supp. 837 (M.D.N.C. 1970).

Hazards to publishers from libel actions have recently been much mitigated by the development of substantive principles under the First Amendment. It is a legitimate question whether this will not sufficiently protect communications media without superimposing a necessarily vague First Amendment standard upon the application of long-arm statutes and thereby possibly creating undue hardship for a plaintiff. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Contact Is Crux of Jurisdictional Investigation.—While the forum state's impact upon the defendant's business is a relevant factor which cannot be overlooked, far greater weight should be given to the contact that the defendant's business has with the markets of the forum state. The latter is the crux of the jurisdictional investigation. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Section 55-144 requires, etc.—

More contacts with the forum State are required in order to come within the limits of § 55-144 than are required under this section. *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

Section 55-144 concerns "foreign corporations transacting business in the State" and, therefore, necessarily seems to be more restrictive in its application than this section, the latter section dealing with "foreign corporations not transacting business" in the State. The foreign corporation must have more contacts with the forum State in order to come within the statutory limits of § 55-144. *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

Substantial contacts with the State are required to bring a corporation within subsection (a) of this section. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15 (1970).

However minimal the burden of defending in a foreign tribunal, a defendant foreign corporation may not be called upon to do so unless he has had the "minimal contacts" with that state that are prerequisite to its exercise of power over him. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Mere Fact of Personal Service Insufficient to Subject Foreign Corporation to Jurisdiction.—The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

Substantial Contacts Make Exercise of Jurisdiction Just.—Direct, substantial and uninterrupted contacts by a foreign corporation with this State make it reasonable and just for the court to exercise its jurisdiction over such foreign corporation as authorized by this section. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

When the activities of the foreign corporation in the forum state have not only been continuous and systematic, but also give rise to the liabilities sued on, the forum state does not violate due process by taking jurisdiction of the suit instituted by a resident of such state, even though no consent to be sued or authorization to an agent to accept service of process has been given. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

If Traditional Notions of Fair Play Are Not Offended.—Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Reducing Physical Contacts Does Not Bar Suit as Matter of Law.—Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market, to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Where Other Contacts Support Right of State to Require Answer.—Where the solicited circulation of a corporation's publications account for a relatively significant portion of the corporation's revenue, notions of fair play and substantial justice support the right of the State to require the corporation to answer nonfrivolous claims arising out of its contacts with the State, even though it has managed to reduce its physical presence in the State to a minimum. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

The essential requirements of "minimum contacts" for obtaining jurisdiction under this section are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state,

invoking the benefits and protection of its law; and (3) the legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Question of Minimum Contacts Is Determined by Applying Fact Situation to Law.—The question of whether there are, in fact, sufficient minimum contacts with a territorial entity by a defendant must be determined by applying the fact situation before the court to the law as it has been set forth by the legislative and judicial authorities. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Minimum Contacts Held to Exist.—Where the defendant's business was a continuing one and a substantial portion of the plaintiff's alleged cause of action arose out of substantial contacts within the State, the minimum contacts necessary to the jurisdiction of the North Carolina courts exist. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Minimum Contacts Held Not to Exist.—Occasional visits by an out-of-state car dealer to the regional office of the Chrysler Corporation in North Carolina, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

Defendant Must Have Purposely Availed Itself of Privilege of Conducting Activities.—It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of and are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in

most instances, hardly be said to be undue. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Such as by Entering into Contract Made and Performed in This State.—By entering into a contract made in this State and to be performed in part in this State, a defendant foreign corporation avails itself of the privilege of conducting its business in this State thus invoking the benefits and protection of its laws. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

"Presence" in State.—"Presence" in the State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Cause of Action Arising outside of State Cannot Be Basis for Jurisdiction.—Where the cause of action arises outside of North Carolina, jurisdiction cannot be obtained under subsection (a) of this section. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Where the last event necessary to render the actor liable occurred in North Carolina, the cause of action is one arising in this State, and subsection (a) is applicable. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Cause of Action Must Arise in State Out of One of Delineated Activities.—This section confers jurisdiction over any cause of action arising out of any one of four specific and well-delineated activities. If one of these four activities is present but the cause of action arises elsewhere, or if none of the four activities is present although others may be present, there is no jurisdictional grant. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

One Subdivision of Subsection (a) as Sole Basis for Jurisdiction.—There is some authority in this State for the proposition that any one of the subdivisions of subsection (a) of this section is valid as the sole basis for granting jurisdiction. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Contract Substantially Connected with State Is Sufficient.—It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state. *Byham v.*

National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

An agent was acting in behalf of defendant in this State in negotiating a contract with plaintiff, and it was reasonable to infer that plaintiff's letter to defendant, in response to the advertisement in the local paper, was referred to the agent by defendant. The agent wrote plaintiff on defendant's stationery and arranged a meeting. When plaintiff's signature to the contract was obtained, defendant accepted it and thereby accepted the benefits of the agent's activities and ratified them. Defendant, as its initial step in performing the contract, sent a representative to this State to assist in procuring a location for plaintiff's "Cibo House." It was held that it did not lie in the mouth of defendant to say that it had no contacts with this State. *Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).*

Contract Made or to Be Performed in State Is Sufficiently Substantial Contact.—Subsection (a)(1) of this section confers jurisdiction upon this State's courts when the contract is made or to be performed in North Carolina; therefore, where it is found that the contract was made in North Carolina or was to be performed in North Carolina, a sufficiently substantial contact to confer jurisdiction on the North Carolina courts has been established. *Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).*

A single contract, where it is made or to be performed, in North Carolina, is sufficient to subject the nonresident corporation to suit in North Carolina under subsection (a)(1) of this section. *Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).*

Thus, Performance in State Authorizes Service of Process.—Service of process upon a foreign corporation is proper under the terms of this section if the contract is to be performed in this State. *Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).*

But Not Casual Presence of Agent.—The casual presence of the corporate agent or even his conduct of single or isolated activity in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. *Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).*

A contract made in this State is one which is executed in this State, i.e., where the "final act necessary to make it a binding obligation was done" in this State.

Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

For a contract to be made in this State, it must be executed in North Carolina, that is, the final act necessary to make it a binding obligation must be done in the forum state. *Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).*

But Contract Is Made Elsewhere When Final Act Is Done Out of State.—There was sufficient evidence to support the finding of the court below that the final act of executing a sales contract was the signature by the seller in Wisconsin, and thus the contract was to be considered made in Wisconsin. *Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).*

Subsection (a) (1) Only Applies to Contracts to Be Performed Here to Substantial Degree.—States which have sought to bring within the jurisdiction of their courts foreign corporations which contract with residents of the State, whether the whole or any part of the contract is to be performed in the forum state, have drafted their "long arm" statutes to read "to be performed in whole or in part" in the State. North Carolina has not chosen to use this broader language in its statute, and so subsection (a) (1) of this section must be construed as relating only to those contracts that are to be performed to a substantial degree within the forum state. *Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).*

This was a sales contract for a machine with delivery f.o.b. the seller's plant in Wisconsin. Almost the entire performance of the contract was to occur at the seller's manufacturing plant, the buyers to accept delivery there and pay all shipping costs to their North Carolina business site. The seller was to provide one technician for one day at the buyers' plant to advise appellants on how they were to install the machine. After the buyers had completed the installation, seller's technician was to return to North Carolina and inspect the installation and supervise the initial production run on the machine. The substantial portion of the overall contract performance therefore occurred at appellee's manufacturing plant in Wisconsin, and subsection (a) (1) did not apply. *Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).*

Initial contact between the parties occurred when a representative of plaintiff visited defendant's office in Chicago to discuss the manufacture of certain molds for plastic cigar tips. Defendant per plain-

tiff's request submitted a quotation to plaintiff in Durham. Plaintiff then submitted a purchase order to defendant containing certain specified terms not included in the quotation. This was accompanied by an acknowledgment copy of the purchase order, which copy defendant was required to execute and return to plaintiff. Thereafter, defendant shipped the mold f.o.b. Chicago to plaintiff in Durham. It was held that the contract was neither made nor to be performed in North Carolina so as to acquire jurisdiction under subsection (a) (1) of this section. *Golden Belt Mfg. Co. v. Janler Plastic Mold Corp.*, 281 F. Supp. 368 (M.D.N.C. 1967), *aff'd*, 391 F.2d 266 (4th Cir. 1968).

Where the sole performance called for under the contract was the payment of funds by the foreign defendant bank to a foreign contractor's creditors and all of the creditors were located in North Carolina; they were to be paid in North Carolina; and the debts arose out of work performed in North Carolina, the conclusion is that the cause of action alleged by plaintiff arises out of a contract to be performed in North Carolina within the meaning of subsection (a)(1). *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Subsection (a)(1) Is Limited to Situations Where Foreign Defendant Is Party to Contract.—The operation of subsection (a)(1) of this section is limited to situations where the foreign defendant against whom a cause of action is asserted is a party to the contract forming the basis of jurisdiction. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

If Defendant Incurs No Obligation to Plaintiff, There Is No Jurisdiction.—Where, under the terms of a contract, the foreign bank defendant incurred no obligation to plaintiff and had no duties to perform that contract affords no basis for jurisdiction. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

An assignment of a contract does not operate to cast upon the assignee the duties and obligations or the liabilities imposed by the contract on the assignor, in the absence of the assignee's assumption of such liabilities. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

The assignee of the proceeds of a construction contract "to be performed in this State," an Alabama bank, was not subject to the courts' jurisdiction under the contract, where the assignee was not a party

to the contract and had incurred no duties or liabilities thereunder. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Where Contract Affords No Basis for Jurisdiction Issue Limited to "Performance within This State".—Where there was no evidence presented and no finding made that any contract forming the basis of the litigation was made in North Carolina, the inquiry is limited to the issue of "performance within this State." *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Size of Claim Is Pertinent.—When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the foreign corporation beyond the reach of the claimant. Whether this is the situation in a given case is pertinent. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

As Is Presence of Witnesses and Evidence.—Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

And Inconvenience to Corporation.—An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

And Whether State's Courts Are Open to Suits by Foreign Corporation.—Consideration should be given to the question whether the courts of the forum state are open to the foreign corporation to enforce obligations of residents of such state created by the activities and contacts of the corporation. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

As They Are in This State.—The courts of the State have been and now are open to a foreign corporation for protection of its activities and to enforce the valid obligations which a resident or residents of this State have assumed by reason of defendant's contacts and activities. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

A nonresident has access to the courts of this State and can sue a foreign corporation. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Consideration should be also given to any legitimate interest the State has in

protecting its residents with respect to the activities and contacts of the foreign corporation. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

This State has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the State for that purpose. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Form of Substituted Service Must Give Reasonable Assurance of Notice. — The form of substituted service adopted by the forum state must give reasonable assurance that the notice to defendant will be actual. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

As Does Form in This State. — The form of substituted service adopted by this State gives reasonable assurance that a defendant would be given actual notice. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Burden of Suing Away from Home Need Not Always Fall on Plaintiff. — There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

But Failure to Provide for Service on Foreign Corporations Does Not Deny Due Process. — It is essential to determine the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against foreign corporations. Provisions for making foreign corporations subject to service in the forum state is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Subsection (a) (3) Is Inapplicable Where Machine Sold Never Enters State. — Subsection (a) (3) of this section was not applicable to an action for breach of a sales contract by a seller in Wisconsin, where the machine sold to North Carolina buyers under the contract had never entered North Carolina nor been used there. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Facts Insufficient to Bring Action within Subsection (a) (3). — Where the parties were both commercial concerns dealing on equal footing at arm's length, and the defendant had never solicited, advertised, or

transacted business in North Carolina, and its only contact with this State was the contract in suit, which was made and substantially performed in another state, it was held that to subject the defendant to the in personam jurisdiction of the courts in North Carolina under subsection (a) (3) of this section would violate due process. *Golden Belt Mfg. Co. v. Janler Plastic Mold Corp.*, 281 F. Supp. 368 (M.D.N.C. 1967), aff'd, 391 F.2d 266 (4th Cir. 1968).

The commission of a single tort is sufficient under this section to grant jurisdiction. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Tortious Act Is Sufficient for Jurisdiction. — The mere fact that a tortious act was committed within the State by the defendant was sufficient under the statute to render the defendant amenable to the jurisdiction of the North Carolina courts, and a finding that the defendant was "doing business" within the State was mere surplusage and not necessary for the purposes of the determination. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Where the allegations of the complaint and the crucial findings of fact made by the court below disclose that the plaintiff's cause of action arose out of a defendant's tortious conduct committed in this State, this suffices under this section to render a foreign corporation amenable to the jurisdiction of this State. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Publication of Libel by Reading Magazine Is Sufficient under Subsection (a) (4). — Assuming that a magazine article was libelous, there would have been a publication of the libel each time it was read in this State, and therefore a tortious act would have been committed in this State, which would be sufficient to grant the North Carolina courts jurisdiction by virtue of subsection (a) (4). *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Plea Insufficient to Bring Action within Subsection (a) (4). — In an action for breach of a sales contract, the buyers sought to bring their action within subsection (a) (4) of this section by alleging that the seller never intended to perform the contract, but planned to deceive the buyers and cause them to act to their detriment. This plea was insufficient to bring the action within subsection (a) (4). The theme of the action was contract and not tort. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Applied in *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140

S.E.2d 3 (1965); *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964); *Bowdach v. Frontierland, Inc.*, 347 F. Supp. 237 (W.D.N.C. 1972).

Cited in *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585

(1966); *Shew v. Royce Chem. Co.*, 5 N.C. App. 444, 168 S.E.2d 701 (1969); *McNamara v. Kerr-McGee Chem. Corp.*, 328 F. Supp. 1058 (E.D.N.C. 1971); *Spartan Leasing, Inc. v. Brown*, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

§ 55-146. Service on foreign corporations by service on Secretary of State.

Editor's Note. — For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

Service on the Secretary of State, etc.—

In accord with original See *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965).

If the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Such Service Authorizes in Personam Judgment.—Where a cause of action stated in a complaint arises out of a transaction which falls within the terms of § 55-145 and service of process is had under this section, the defendant is brought within the jurisdiction of the court for purposes of an in personam judgment. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

The form of substituted service adopted by this State gives reasonable assurance that a defendant would be given actual notice. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Stipulation Held to Concede Service Reasonably Assures Notice. — Where the parties stipulated that "the mechanics of service and return set forth in subsections (a) and (b) of § 55-146 of the General Statutes of North Carolina were in all respects complied with," it was held that it was conceded that this section gives reasonable assurance that the notice to defendant will be actual, and in this case was actual. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Applied in *Throwing Corp. of America v. Deering Milliken Research Corp.*, 302 F. Supp. 487 (M.D.N.C. 1969).

Cited in *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965); *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968); *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970); *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970); *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

§ 55-146.1. Alternative jurisdiction over and service of process on foreign corporations.—In addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3; 1973, c. 469, s. 44.)

Editor's Note. — Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The 1973 amendment, effective Oct. 1, 1973, substituted "provisions" for "procedure" near the beginning of the section.

The Rules of Civil Procedure (§ 1A-1) and the jurisdiction statute (§ 1-75.1 et seq.) which accompanies them seek to secure for the courts of North Carolina the

full extent of jurisdiction constitutionally allowable to them, and accordingly there is duplication of some of the "long arm" statutes already in force in this State with regard to corporations and insurers. It is the purpose of this section and §§ 55A-68.1 and 58-153.2 to allow service of process and the obtaining of jurisdiction under either procedure.

§ 55-150. Withdrawal of foreign corporation.

Editor's Note. — Session Laws 1973, c. 476, s. 193, effective July 1, 1973, amends

this section by substituting "Secretary of Revenue" for "Commissioner of Revenue."

§ 55-154. Transacting business without certificate of authority.

Applied in State ex rel. Glamorgan Pipe & Foundry Co. v. Benfield, 266 N.C. 342, 145 S.E.2d 912 (1966).
Stated in Westarc Leasing Corp. v. Capital Sign Serv., Inc., 268 N.C. 601, 151 S.E.2d 204 (1966).

ARTICLE 11.

Fees and Taxes.

§ 55-155. Fees.—(a) In addition to any taxes prescribed by G.S. 55-156, the Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

- (1) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration (G.S. 55-12 (f) and (h)), \$ 5.00
- (2) For filing a notice of transfer of a reserved corporate name (G.S. 55-12 (g)), 5.00
- (3) For filing articles of incorporation (G.S. 55-7), 5.00
- (4) For filing an application of a foreign corporation for a certificate of authority to transact business in this State and issuing a certificate of authority (G.S. 55-138), 5.00
- (5) For filing a statement of classification of shares (G.S. 55-42 (e)), 5.00
- (6) For filing a statement of the change of a registered office or registered agent, or both, of a domestic or foreign corporation (G.S. 55-14, G.S. 55-142, G.S. 55-153), 3.00
- (7) For filing a notice of resignation of a registered agent (G.S. 55-14 (d)), 1.00
- (8) For filing a notice of resignation of a nonresident director under G.S. 55-33 (a), 1.00
- (9) For filing a certificate of reduction of capital (G.S. 55-48), 5.00
- (10) For filing articles of amendment (G.S. 55-103), 5.00
- (11) For filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to transact business in this State (G.S. 55-147), 5.00
- (12) For filing a restated charter (G.S. 55-105), 5.00
- (13) For filing an application of a foreign corporation for an amended certificate of authority to transact business in this State and issuing an amended certificate of authority (G.S. 55-149), 5.00
- (14) For filing articles of merger or consolidation (G.S. 55-109), 5.00
- (15): Repealed by Session Laws 1969, c. 751, s. 45, effective October 1, 1969.
- (16) For filing a copy of articles of merger of a foreign corporation holding a certificate of authority to transact business in this State (G.S. 55-148), 5.00
- (17) For filing a statement setting forth the name and address in this State of the registered agent of a foreign corporation not transacting business in this State (G.S. 55-145), 5.00
- (18) For receiving any service of process as statutory agent either of a corporation or of a director of a corporation (G.S. 55-15 (b), G.S. 55-33 (d), G.S. 55-146), 1.00
 which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or proceeding.
- (19) For issuing a certificate of revocation of authority of a foreign corporation (G.S. 55-152), 5.00

- (20) : Repealed by Session Laws 1969, c. 751, s. 45, effective October 1, 1969.
- (21) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55-150), 5.00
- (22) For filing articles of voluntary dissolution by directors (G.S. 55-116), 5.00
- (23) For filing articles of voluntary dissolution by written consent of shareholders (G.S. 55-117), 5.00
- (24) For filing articles of voluntary dissolution by action of directors and stockholders (G.S. 55-118), 5.00
- (25) For filing a statement of revocation of dissolution (G.S. 55-120), 2.00
- (26) For filing a certificate of completed liquidation (G.S. 55-121),... 2.00
- (27) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55-4 (c)) :
- For the first page thereof, 1.00
- For each additional page,40
- For affixing his certificate and official seal thereto, 2.00
- (28) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation:
- For each page,20
- For affixing his certificate and official seal thereto, 2.00
- (29) For filing any other document not herein specifically provided for, 5.00

(b) The filing fees hereinbefore prescribed do not include copies or certified copies and the fees for such copies are those prescribed by subdivisions (27) and (28) of subsection (a) of this section.

(c) For recording and copying any corporate document or paper required by this chapter to be recorded in his office, the register of deeds shall collect such amounts as are prescribed by G.S. 161-10 or other applicable laws. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 43, 45; c. 797, s. 4.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of superior court" and "G.S. 161-10" for "G.S. 2-26" in subsection (c).

The first 1969 amendment, effective Oct. 1, 1969, rewrote subdivision (1) of subsection (a) and eliminated former subdivi-

sions (15), relating to filing a statement of merger or consolidation of a domestic and foreign corporation, and (20), relating to filing a certificate extending the period of existence of a corporation, of subsection (a).

The second 1969 amendment added "In addition to any taxes prescribed by G.S. 55-156" at the beginning of subsection (a).

§ 55-156. Taxes.—(a) In addition to any fees prescribed by G.S. 55-155, on filing any of the following certificates or papers relative to corporations in the office of the Secretary of State, the following taxes shall be collected by the Secretary of State, and remitted to the State Treasurer for the use of the State:

(1) Articles of incorporation:

For each \$1,000.00 of the total amount of capital stock authorized,	\$.40
but in no case less than	40.00
nor more than	1,000.00

(2) Articles of amendment which include an authorization to increase capital stock:

For each \$1,000.00 of the total increase authorized,40
but in no case less than	40.00
nor more than	1,000.00

(3) Articles of amendment which do not include an authorization to increase capital stock,	40.00
(4) Articles of dissolution,	5.00
(5) Application by foreign corporation for certificate of authority to transact business in this State: For each \$1,000.00 of its authorized capital stock,40
but in no case less than	40.00
nor more than	500.00
(6) Articles of merger or consolidation which increase the authorized capital stock which the surviving or new corporation, domestic or foreign, will have authority to issue above the aggregate authorized capital stock which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this State had authority to issue: For each \$1,000.00 of the total amount of such increase ..	.40
but in no case less than	40.00
nor more than	1,000.00
(7) Articles of merger or consolidation which do not increase the authorized capital stock which the surviving or new corporation, domestic or foreign, will have authority to issue above the aggregate authorized capital stock which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this State had authority to issue,	40.00
(b) For the purpose of computing taxes under this section, shares of no par value shall be treated as if they were of one dollar (\$1.00) par value. (1957, c. 1180; 1969, c. 751, s. 42; c. 797, s. 5.)	
Editor's Note. —The first 1969 amendment, effective Oct. 1, 1969, substituted "one dollar (\$1.00)" for "one hundred dollar (\$100.00)" in subsection (b).	The second 1969 amendment added "In addition to any fees prescribed by G.S. 55-155" at the beginning of subsection (a).

ARTICLE 12.

Curative Provisions.

§ 55-158. **Certain corporate conveyances validated.**—All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1971, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23; 1949, c. 436; G. S., s. 55-41; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1971, c. 60.)

Editor's Note.—
The 1971 amendment substituted "January 1, 1971" for "January first, one thousand nine hundred fifty-seven." The amendatory act provides that it shall not apply to pending litigation.

Quoted in Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 55-164.1. **New corporations organized to succeed to rights in corporate charter forfeited.**—Whenever the charter of a corporation created under the laws of the State of North Carolina has, on account of failure to make any report or return or to pay any tax or fee for such length of time as to lose its charter, and where thereafter, under the laws of the State of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same

rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this State, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation has never expired by reason of its failure to make the reports hereinbefore referred to. (1959, c. 1316, s. 28½; 1973, c. 469, s. 45.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, substituted "Whenever the charter of" for "Wherever" at the beginning of the first paragraph and substituted, in that paragraph, "any report or return or to pay any tax or fee" for "reports to the different State authorities."

Chapter 55A.

Nonprofit Corporation Act.

Article 3.

Formation, Name and Registered Office.

Sec.

55A-8. Corporate existence; filing of articles of incorporation; effect.

Article 4.

Powers and Management.

55A-24.1. Informal or irregular action by directors or committees; attendance by telephone.

55A-27.1. Form of records.

Article 6.

Fundamental Changes.

55A-37.1. Restated charter.

Sec.

55A-42.1. Merger or consolidation of domestic and foreign corporations.

Article 7.

Dissolution and Liquidation.

55A-44.1. Extension of duration after expiration.

Article 8.

Foreign Corporations.

55A-68.1. Alternative jurisdiction over and service of process on foreign corporations.

Cross Reference.—As to jurisdiction of the superior court division over proceedings under this Chapter, see § 7A-249.

ARTICLE 1.

General Provisions.

§ 55A-1. Title.

Cited in *Coats v. Sampson County Memorial Hosp., Inc.*, 264 N.C. 332, 141 S.E.2d 490 (1965); *Sigmund Sternberger Foundation v. Tannenbaum*, 273 N.C. 658,

161 S.E.2d 116 (1968); *Fuquay-Varina Tobacco Bd. of Trade v. Hardin*, 316 F. Supp. 366 (E.D.N.C. 1970).

§ 55A-3. Applicability of chapter.—(a) The provisions of this chapter relating to domestic corporations shall apply to:

- (1) All corporations hereafter organized under this chapter.
- (2) All nonprofit corporations heretofore organized under any act hereby repealed, except nonprofit corporations having capital stock.
- (3) All nonprofit corporations without capital stock heretofore or hereafter organized under any other act, unless there is some other specific statutory provision particularly applicable to such corporations or inconsistent with some provisions of this chapter, in which case that other provision prevails. Nothing herein shall apply to hospital and medical service corporations as defined in chapter 57 of the General Statutes which were incorporated prior to July 1, 1957 or repeal or modify the provisions of G.S. 54-138.

(b) The provisions of this chapter relating to foreign corporations shall apply to all such corporations conducting affairs in this State for purposes for which a corporation might be organized under this chapter. (1955, c. 1230; 1967, c. 659.)

Editor's Note.—The 1967 amendment substituted "as defined in chapter 57 of the General Statutes which were incorpo-

rated prior to July 1, 1957" for "regulated by chapter 57 of the General Statutes" in subdivision (3) of subsection (a).

ARTICLE 2.

Execution and Filing of Certain Corporate Documents.

§ 55A-4. Execution of corporate documents for filing; filing, recording and effectiveness.—(a) Whenever the provisions of this chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this chapter:

- (1) There shall be an original executed document and also one conformed copy.
- (2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. If required to be executed by designated individuals each of them shall sign.
- (3) Except where the provisions of this chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.
- (4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments, as the case may be) or may in lieu of such extension contain the legend, after the name of the signers, substantially as follows:
“Original duly verified (acknowledged) by all signers.”
- (5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word “filed” and the hour, day, month, and year of the filing thereof, and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the corporation or its representative.
- (6) The copy, certified as aforesaid, shall be promptly delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a) (5) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected, provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than twenty days

subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected. Unless otherwise provided in this chapter with respect to some specific document, failure to deliver it for recording in the office of the register of deeds shall only subject the corporation to a penalty of one hundred dollars (\$100.00) to be collected by the Secretary of State.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office or, if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1955, c. 1230; 1967, c. 13, s. 2; c. 823, s. 21.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—The first 1967 amendment rewrote subsection (b).

The second 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds"

for "clerk of the superior court" in the first sentence and for "clerk" in the second sentence of subdivision (6) of subsection (a) and for "clerk of the superior court" in subsection (b).

ARTICLE 3.

Formation, Name and Registered Office.

§ 55A-6. Incorporators. — One or more natural persons, whether or not residents of this State, of the age of 18 years or more may act as incorporators of a corporation by signing and acknowledging articles of incorporation, which shall be filed according to G.S. 55A-4. The acknowledgment shall be before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. (1955, c. 1230; 1969, c. 875, s. 1; 1971, c. 1231, s. 1.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, substituted "One" for "Three" at the beginning of the section.

The 1971 amendment substituted "18" for "21" in the first sentence.

§ 55A-8. Corporate existence; filing of articles of incorporation; effect.—The time when corporate existence begins is determined by the provisions of G.S. 55A-4, and a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, except as against this State in a proceeding to annul or revoke the articles of incorporation. (1955, c. 1230; 1967, c. 13, s. 4.)

Editor's Note.—The 1967 amendment rewrote this section.

§ 55A-9. Organization meeting of directors.—After the filing of the articles of incorporation in the office of the Secretary of State an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organizational meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55A-86. (1955, c. 1230; 1969, c. 875, s. 2.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, added the last sentence.

§ 55A-10. Corporate name.—(a) The corporate name shall not contain any word or phrase likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(b) The corporate name shall not, subject to the provisions of G.S. 55A-60, be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or of any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, or a corporate name the exclusive right to which is at the time reserved or registered by some other person in the manner prescribed in this section or G.S. 55-12.

(c) The exclusive right to a corporate name not prohibited by this section may be reserved for a period of 90 days by:

- (1) Any person intending to organize a corporation under this chapter,
- (2) Any domestic corporation intending to change its name,
- (3) Any foreign corporation intending to make application for a certificate of authority to conduct affairs in this State,
- (4) Any foreign corporation authorized to conduct affairs in this State and intending to change its name, or
- (5) Any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to conduct affairs in this State.

The same name shall not be reserved for two or more consecutive 90-day periods by the same applicant or for the use and benefit of the same applicant; nor shall such consecutive reservations be made of names so similar as to fall within the prohibition of this section.

(d) Any person or corporation acquiring the good will of a domestic corporation or of a foreign corporation authorized to conduct affairs in this State may, on furnishing the Secretary of State satisfactory evidence of such acquisition, reserve the exclusive right to the corporate name of the said corporation for a period of ten years.

(e) The reservation of name, pursuant to subsections (c) and (d) of this section, shall be made by filing with the Secretary of State a verified application therefor stating the name and address of the applicant, and the Secretary of State shall, upon tender of the fee hereinafter prescribed, reserve the name exclusively for the applicant unless he finds that the name is not available under the provisions of this section.

(f) The exclusive right to a specified corporate name reserved hereunder, may, on tender of the fee hereinafter prescribed, be transferred to any other person or corporation by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(g) Any foreign corporation not conducting affairs in this State may register its corporate name, if not prohibited by this section, by filing with the Secretary of State a verified application therefor setting forth the name and address of the principal office of the corporation, the jurisdiction in which it is incorporated, the date of its incorporation, a statement that it is organized and conducting affairs in good standing under the laws of the jurisdiction in which it is incorporated, and a brief statement of the business in which it is engaged; and the Secretary of State shall, upon tender of the fee prescribed by G.S. 55A-77 (a), register the name exclusively for the use of such foreign corporation, unless he finds that the name is not available under the provisions of this section. Such registration shall be effective for a period of one year, and it may be renewed from year to year, not to exceed ten years, by filing with the Secretary of State a verified renewal application setting forth the same facts required to be set forth in the original application

for registration. Any renewal application filed after the expiration of the registration shall be treated as a new application for registration.

(h) The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false.

(i) The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State. (1955, c. 1230; 1969, c. 875, s. 3.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote this section.

§ 55A-12. Change of registered office or registered agent.

(c) If the statement purporting to effectuate such changes is not recorded in all the offices wherein recording is required by this section, persons asserting claims against the corporation may treat as the registered agent or registered office of the corporation either the one newly designated in the statement or the preexisting one.

(e) In lieu of the procedure set out in subsection (a) above the location of the registered office of a domestic corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of the corporations recited in the certificate. Such certificate shall be filed in duplicate in the office of the Secretary of State who shall then furnish a certified copy of the same, showing the date of such filing, and shall return the copy so certified to the registered agent, and the copy, certified as aforesaid, shall, within 60 days after the receipt by the registered agent, be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the registered agent. The fee to be charged by the Secretary of State for the filing of such certificate shall be three dollars (\$3.00) for each corporation listed in said certificate, the total not to exceed two hundred dollars (\$200.00). (1955, c. 1230; 1957, c. 979, ss. 12, 13; 1973, c. 314, ss. 1, 2.)

Editor's Note.—

The 1973 amendment, effective Oct. 1, 1973, substituted "not recorded in all" for "recorded in some" near the beginning of

subsection (c) and added subsection (e).

As the rest of the section was not changed by the amendment, only subsections (c) and (e) are set out.

ARTICLE 4.

Powers and Management.

§ 55A-15. General powers.

(b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this chapter or in its charter, every corporation shall also have power:

- (1) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.
- (2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
- (3) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, domestic or foreign business corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.
- (4) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income.
- (5) To procure for its benefit insurance on the life or physical or mental ability of any employee, including any officer, or, in case of a religious, educational, or charitable corporation, any sponsor, contributor, student or former student, whose death or disability might cause financial loss to the corporation, and to this end the corporation has an insurable interest in the lives of each of such persons.
- (6) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.
- (7) To conduct its affairs, carry on its operations, and have offices and exercise the powers granted by this chapter anywhere in the world.
- (8) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(c) The foregoing powers shall be limited as follows for any corporation organized under this Chapter which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, unless any such corporation shall, by its articles of incorporation or amendment thereto, specifically state that it does not intend to be so limited:

- (1) Each such corporation shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.
- (2) No such corporation shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.
- (3) No such corporation shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.
- (4) No such corporation shall make any investments in such manner as to subject it to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.
- (5) No such corporation shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or correspond-

ing provisions of any subsequent federal tax laws. (1955, c. 1230; 1957, c. 783, s. 7; 1969, c. 875, s. 4; 1971, c. 1136, s. 1.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, inserted "or physical or mental ability" and "or disability" in subdivision (5) of subsection (b).

The 1971 amendment added subsection (c).

As subsection (a) was not changed by the amendments, it is not set out.

§ 55A-16. Special powers; public parks and drives and certain recreational corporations.—Any corporation heretofore or hereafter formed for the purpose of creating and maintaining public parks and drives shall have full power and authority to lay out, manage, and control parks and drives within the State, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors, and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. The terms "public parks and drives" as used in this section shall be construed so as to include playgrounds, recreational centers, and other recreational activities and facilities which may be provided and established under the sponsorship of any county, city, town, township, or school district in North Carolina and constructed or established with the assistance of the government of the United States or any agency thereof. (1955, c. 1230; 1973, c. 695, s. 9.)

Editor's Note. — The 1973 amendment, effective Jan. 1, 1974, deleted the former fifth sentence, which provided: "All prop-

erty owned by it and appropriated exclusively for public parks and drives shall not be subject to taxation."

§ 55A-20. Number, election and term of directors.—(a) The number constituting the board of directors of a corporation shall be not less than three. The number constituting the initial board of directors shall be fixed by the articles of incorporation. In the absence of a provision in the articles of incorporation, the charter, or the bylaws fixing the number of directors, the number shall be the same as that fixed in the articles of incorporation for the initial board of directors, subject to the provisions of this section. The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors, and, if so, shall designate the manner in which such number shall from time to time be determined. If the fixing of a maximum and minimum number of directors is authorized and the corporation has members entitled to vote for directors, the articles of incorporation, the charter, or the bylaws may provide that any directorships not filled by the members, shall be treated as vacancies to be filled by and in the discretion of the board of directors.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter, if the corporation has members entitled to vote for directors, directors shall be elected by the members entitled to vote at the first annual meeting and at each subsequent annual meeting of the members. Such election may be by mail if the bylaws so provide. If the corporation does not have members or members entitled to vote for directors, directors shall be elected or appointed in the manner and for the terms as provided in the bylaws. In the absence of a

provision fixing the term of office, the term of office of a director shall be one year. (1973, c. 192, ss. 1, 2.)

Editor's Note. — The 1973 amendment rewrote subsection (a) and inserted "entitled to vote for directors" in the second sentence and "for directors" in the fourth sentence of subsection (c).

As the other subsections were not changed by the amendment, only subsections (a) and (c) are set out.

§ 55A-23. Committees.—(a) Unless otherwise provided in the charter or bylaws, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the charter or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation, except that no such committee shall have authority as to the following matters:

- (1) The dissolution, merger or consolidation of the corporation; the amendment of the charter of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.
- (2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.
- (3) The amendment or repeal of the bylaws, or the adoption of new bylaws.
- (4) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(b) Other committees not having and exercising the authority of the board of directors in the management of the corporation may be designated by a resolution adopted by a majority of the directors present at a meeting at which a quorum is present.

(c) Any committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55A-22 or G.S. 55A-86. The designation of any committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof, of any responsibility or liability imposed upon it or him by law. (1955, c. 1230; 1969, c. 875, s. 5.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote this section.

§ 55A-24.1. Informal or irregular action by directors or committees; attendance by telephone.—(a) Action taken by a majority of the directors or members of a committee without a meeting is nevertheless board or committee action if written consent to the action in question is signed by all the directors or members of the committee, as the case may be, and filed with the minutes of the proceedings of the board or committee, whether done before or after the action so taken.

(b) If a meeting of directors otherwise valid is held without proper call or notice, action taken at such meeting otherwise valid is deemed ratified by a director who did not attend unless promptly after having knowledge of the action taken and of the impropriety in question he files with the secretary or assistant secretary of the corporation his written objection to the holding of the meeting or to any specific action so taken.

(c) Unless otherwise provided in the charter or bylaws, any one or more directors or members of a committee may participate in a meeting of the board or committee by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other and such

participation in a meeting shall be deemed presence in person at such meeting. (1973, c. 314, s. 3.)

Editor's Note. — Session Laws 1973, c. 314, s. 10, makes the act effective Oct. 1, 1973.

§ **55A-27.1. Form of records.**—Any records maintained by a corporation in the regular course of its business, including its books of account and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated readout or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been. (1969, c. 875, s. 6.)

Editor's Note. — Session Laws 1969, c. 875, s. 12, makes the act effective Oct. 1, 1969.

ARTICLE 6.

Fundamental Changes.

§ **55A-37.1. Restated charter.** — (a) At any time after its charter has been amended, a corporation may by action of its board of directors, without necessity of vote of the members, cause to be prepared a document entitled "Restated Charter," which shall integrate into one document its original articles of incorporation (or articles of consolidation) and all amendments thereto, including those affected by articles of merger or consolidation, except that: In lieu of the address of the initial registered office and the name of the initial registered agent, the restated charter shall state the address of the then registered office and the name of its then registered agent.

(b) The restated charter shall also set forth that it purports merely to restate but not to change the provisions of the original articles of incorporation as supplemented and amended and that there is no discrepancy, other than as expressly permitted by this section, between the said provisions and the provisions of the restated charter.

(c) The restated charter shall be executed by the corporation and be filed as provided in G.S. 55A-4.

(d) A copy of the restated charter certified by the Secretary of State shall be presumed, until otherwise shown, to be the full and true charter of the corporation as in effect on the date when so certified.

(e) A corporation may also integrate its articles of incorporation and all amendments thereto by the procedure provided in this chapter for amending the charter. (1965, c. 762.)

§ **55A-41. Articles of merger or consolidation.** — (a) Upon such approval, articles of merger or articles of consolidation shall be executed by each corporation and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent corporations have their registered offices.

(1967, c. 823, s. 22.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register

of deeds" for "clerk of the superior court" changed by the amendment, they are not in subsection (a). set out.

As subsections (b) and (c) were not

§ 55A-42. Effect of merger or consolidation.

- (4) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subdivision are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

(1967, c. 950, s. 2.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, added the last sentence in subdivision (4).

As the rest of the section was not affected by the amendment, it is not set out.

§ 55A-42.1. Merger or consolidation of domestic and foreign corporations. — (a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation of this State or of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

(b) Each domestic corporation shall comply with the provisions of this Chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of any act or omission of such constituent corporation prior to the merger or consolidation, and process therein may be served as provided in G.S. 55A-68.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be a corporation of this State. If the surviving or new corporation is to be a corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise. (1973, c. 314, s. 4.)

Editor's Note. — Session Laws 1973, c. 314, s. 10, makes the act effective Oct. 1, 1973.

ARTICLE 7.

*Dissolution and Liquidation.***§ 55A-44. Voluntary dissolution.**

(b) Upon the adoption of such resolution by the members, or by the board of directors where there are no members or no members having voting rights, the corporation shall cease to conduct its affairs except insofar as may be necessary for the winding up thereof, shall immediately cause a notice of the proposed dissolution to be mailed to each known creditor of the corporation, and shall proceed to collect its assets and apply and distribute them as provided in this Chapter. The corporation may follow the same procedure upon the expiration of any period of duration to which it is limited by its charter. (1955, c. 1230; 1973, c. 314, s. 5.)

Editor's Note. — The 1973 amendment, As subsection (a) was not changed by effective Oct. 1, 1973, added the second the amendment, it is not set out. sentence of subsection (b).

§ 55A-44.1. Extension of duration after expiration.—(a) If a corporation has continued to conduct its business after the expiration of its charter, it may at any time amend its charter so as to extend or perpetuate its period of existence. Expiration of a charter does not of itself create any vested right on the part of any member or creditor to prevent such charter amendment.

(b) No acts or contracts of a corporation during the period within which it could have extended its existence as permitted in this section, whether or not it has taken action so to extend its existence, shall be in any degree invalidated by the expiration of the charter. (1973, c. 314, s. 6.)

Editor's Note. — Session Laws 1973, c. 314, s. 10, makes the act effective Oct. 1, 1973.

§ 55A-48. Articles of dissolution.—If the voluntary dissolution proceedings have not been revoked, then when all debts, liabilities and obligations of the corporation shall have been paid and discharged, or adequate provision shall have been made therefor, and all of the remaining property and assets of the corporation shall have been transferred, conveyed or distributed in accordance with the provisions of this Chapter, articles of dissolution shall be executed and filed in accordance with the provisions of G.S. 55A-4, setting forth:

- (7) Where the corporation was dissolved upon the expiration of its charter, a statement of such fact, in lieu of the statement required by subdivision (2) or subdivision (3) above. (1955, c. 1230; 1973, c. 314, s. 7.)

Editor's Note. — The 1973 amendment, changed by the amendment, only the introductory paragraph and subdivision (7) are effective Oct. 1, 1973, added subdivision (7). set out.

As the rest of the section was not

§ 55A-50. In voluntary dissolution in action by Attorney General.

Cited in *YWCA v. Morgan*, 281 N.C. 485, 189 S.E.2d 169 (1972).

§ 55A-56. Duties of officials as to decrees and orders concerning dissolution.—A court decree effecting or canceling a dissolution of a corporation or a court order declaring liquidation completed shall contain a direction to the clerk of that court promptly to file one certified copy of such decree or order with the Secretary of State and also to file a certified copy thereof with the register of deeds of the county wherein the corporation has its registered office. The fees for the preparation, certificates, and filing of such decree or order shall be taxed as a part of the costs in the action. (1955, c. 1230; 1967, c. 823, s. 23.)

Cross Reference.—See Editor's note to **Editor's Note.** — The 1967 amendment, effective Jan. 1, 1968, substituted "register

§ 53-5.

of deeds" for "clerk of the superior court" end of that sentence, "unless the decree or in the first sentence and deleted, at the order was entered in that court."

ARTICLE 8.

Foreign Corporations.

§ 55A-60. Corporate name of foreign corporation.

(b) The corporate name shall not be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner prescribed in G.S. 55A-10, except that the Secretary of State may in his discretion issue a certificate of authority to a foreign corporation which has a corporate name the same as or similar to that of some other domestic corporation or foreign corporation authorized to transact business or conduct affairs in this State:

- (1) If the Secretary of State finds, upon proof by affidavit or otherwise, that such corporations are not engaged in the conduct of the same or similar affairs and that the public is not likely to be confused or deceived, and if, upon requirement by the Secretary of State in his discretion, such foreign corporation agrees in its application for certificate of authority to add to its corporate name in this State words indicating the state or country under the laws of which it is incorporated; or
- (2) If the foreign corporation agrees in its application for certificate of authority to conduct affairs in this State only under an assumed name that would be available for its use in this State, in which event such corporation shall thereafter comply with all of the provisions of law, including the provisions of G.S. 66-68 through 66-71, relating to doing business under an assumed name and such assumed name shall be deemed to be the name of such foreign corporation in this State and shall be entitled to the same protections under this chapter as if it were the name of such foreign corporation.

(1969, c. 875, s. 7.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, rewrote subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

§ 55A-61. **Application for certificate of authority.**—(a) A foreign corporation, in order to procure a certificate of authority to conduct affairs in this State, shall make application therefor to the Secretary of State, which application shall set forth:

- (1) The name of the corporation and the state or country under the laws of which it is incorporated;
- (2) If the corporation agrees under G.S. 55A-60 (b) to add to its corporate name in this State words indicating its jurisdiction of incorporation or agrees to conduct affairs under an assumed name, then the name of the corporation with the words so added or the assumed name;
- (3) The date of incorporation and the period of duration of the corporation;
- (4) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated;
- (5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the corporation in this State, and the name of its proposed registered agent in this State at such address;

- (6) The purposes of the corporation which it proposes to pursue in conducting its affairs in this State;
 - (7) The names and respective addresses of the directors and officers of the corporation;
 - (8) A statement that, in consideration of the issuance of a certificate of authority to conduct affairs in this State, the corporation appoints the Secretary of State of North Carolina as its agent to receive service of process, notice, or demand whenever the corporation fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office.
- (b) Such application shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application. (1955, c. 1230; 1957, c. 979, s. 14; 1969, c. 875, s. 8.)

Editor's Note.—
The 1969 amendment, effective Oct. 1, 1969, inserted present subdivision (2) in subsection (a) and renumbered former subdivisions (2) through (7) of subsection (a) as (3) through (8). The amendment also deleted "purpose or" preceding "purposes" in present subdivision (6) of subsection (a).

§ 55A-68.1. Alternative jurisdiction over and service of process on foreign corporations.—In addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3; 1973, c. 314, s. 8.)

Editor's Note. — Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1. The 1973 amendment, effective Oct. 1, 1973, substituted "provisions" for "procedures" near the beginning of the section.

§ 55A-72. Withdrawal of foreign corporation.

Editor's Note. — Session Laws 1973, c. 476, s. 193, effective July 1, 1973, amends this section by substituting "Secretary of Revenue" for "Commissioner of Revenue."

ARTICLE 9.

Fees and Taxes.

§ 55A-77. Fees.—(a) The Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

- (1) For filing articles of incorporation (G.S. 55A-7), \$5.00
- (2) For filing an application of a foreign corporation for a certificate of authority to conduct affairs in this State and issuing a certificate of authority (G.S. 55A-61), 5.00
- (3) For filing an application of a foreign corporation for an amended certificate of authority to conduct affairs in this State and issuing an amended certificate of authority (G.S. 55A-71), 5.00
- (4) For filing articles of amendment (G.S. 55A-36), 5.00
- (5) For filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to conduct affairs in this State (G.S. 55A-69), 5.00
- (6) For filing articles of merger or consolidation (G.S. 55A-41), 5.00
- (7) For filing a copy of articles of merger of a foreign corporation holding a certificate of authority to conduct affairs in this State (G.S. 55A-70), 5.00
- (8) For receiving any service of process as statutory agent of a corporation (G.S. 55A-13, G.S. 55A-68, G.S. 55A-75), 1.00

which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or proceeding.

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| (9) For filing a notice of resignation of a registered agent (G.S. 55A-12 (d)), | 1.00 |
| (10) For filing a statement of the change of registered office or registered agent of a domestic or foreign corporation (G.S. 55A-65, G.S. 55A-75, G.S. 55A-12), | 3.00 |
| (11) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55A-72), | 5.00 |
| (12) Issuance of a certificate of revocation of authority (G.S. 55A-74), | 5.00 |
| (13) For filing articles of dissolution (G.S. 55A-48), | 5.00 |
| (14) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55A-4 (c)): | |
| for the first page thereof, | 1.00 |
| for each additional page, | .40 |
| for affixing his certificate and official seal thereto, | 2.00 |
| (15) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation: | |
| for each page, | .20 |
| for affixing his certificate and official seal thereto, | 2.00 |
| (16) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration G.S. 55A-10 (e) and (f), | 5.00 |
| (17) For filing any other document not herein specifically provided for, | 5.00 |

(c) For recording and copying any corporate document or paper required by this chapter to be recorded in his office, the register of deeds shall collect such amounts as are prescribed by G.S. 161-10 or other applicable laws. (1957, c. 1179; 1967, c. 823, s. 24; 1969, c. 875, s. 10.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note. — The 1967 amendment substituted "register of deeds" for "clerk of superior court" and "G.S. 161-10" for "G.S. 2-26" in subsection (c).

The 1969 amendment, effective Oct. 1,

1969, inserted present subdivision (16) of subsection (a) and renumbered former subdivision (16) of subsection (a) as (17).

As the rest of the section was not changed by the amendments, only subsections (a) and (c) are set out.

ARTICLE 10.

Miscellaneous Provisions.

§ 55A-86. **Action by members without a meeting.**—Any action required by this chapter to be taken at a meeting of the members or of the board of directors, or of a committee of directors, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the members entitled to vote with respect to the subject matter thereof, or by a majority of the directors, or by a majority of the members of the committee of directors, as the case may be, and filed with the secretary of the corporation as part of the corporate records, whether done before or after the action so taken; provided, however, that this shall not apply whenever the charter or the bylaws

of the corporation specifically require that such action be by a unanimous vote. (1955, c. 1230; 1963, c. 786; 1969, c. 875, s. 9.)

Editor's Note.—

The 1969 amendment, effective Oct. 1, 1969, rewrote this section.

§ 55A-88. Certain religious, etc., associations deemed incorporated.

Applied in *Goard v. Branscom*, 15 N.C.

App. 34, 189 S.E.2d 667 (1972).

Chapter 55B.

Professional Corporation Act.

Sec.		Sec.	
55B-1.	Title.	55B-10.	Registration with licensing board.
55B-2.	Definitions.	55B-11.	Renewal of certificate of registration.
55B-3.	Business Corporation Act applicable.	55B-12.	Application of regulations of licensing boards.
55B-4.	Formation of corporation.	55B-13.	Suspension or revocation of certificate of registration.
55B-5.	Corporate name.	55B-14.	Types of professional services.
55B-6.	Capital stock.	55B-15.	Applicability of chapter.
55B-7.	Death or disqualification of a stockholder or employee.		
55B-8.	Rendition of professional services.		
55B-9.	Professional relationship and liability.		

§ 55B-1. **Title.**—This chapter may be cited as “The Professional Corporation Act.” (1969, c. 718, s. 1.)

Editor's Note. — Session Laws 1969, c. 718, s. 23, makes the act effective Jan. 1, 1970.

§ 55B-2. **Definitions.**—As used in this Chapter, the following words shall, unless the context requires otherwise, have the following meanings:

- (1) “Disqualified person” means a licensed person who for any reason becomes legally disqualified to render the same professional services which are or were being rendered by the professional corporation of which such person is an officer, director, shareholder or employee.
- (2) “Licensee” means any natural person who is duly licensed by the appropriate licensing board to render the same professional services which will be rendered by the professional corporation of which he is, or intends to become, an officer, director, shareholder or employee.
- (3) “Licensing board” means a board which is charged with the licensing and regulating of the profession or practice in this State in which the professional corporation is organized to engage.
- (4) The term “licensing board,” as the same applies to attorneys at law, shall mean the Council of the North Carolina State Bar, and it shall include the North Carolina State Board of Law Examiners only to the extent that the North Carolina Board of Law Examiners is authorized to issue licenses for the practice of law under the supervision of the Council of the North Carolina State Bar.
- (5) “Professional corporation” means a corporation which is engaged in rendering the professional services as herein specified and defined pursuant to a certificate of registration issued by the licensing board regulating the profession or practice, and which has as its shareholders only individuals who themselves are duly licensed to render the same professional service as the corporation, and which designates itself as may be required by this statute, and which is organized under the provisions of this chapter and of chapter 55, the Business Corporation Act.
- (6) The term “professional service” means any type of personal or professional service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license from a licensing board as herein defined, and pursuant to the following provisions of the General Statutes: Chapter 83, “Architects”; Chapter 84, “Attorneys at Law”; Chapter 93, “Public Accountants”; and Article 1, “Practice

of Medicine," Article 2, "Dentistry," Article 6, "Optometry," Article 7, "Osteopathy," Article 8, "Chiropractic," Article 11, "Veterinaries," Article 12, "Podiatrists," of Chapter 90; Article 18A, "Practicing Psychologist," of Chapter 90; Chapter 89, "Engineering and Land Surveying"; Chapter 89A, "Landscape Architects." (1969, c. 718, s. 2; 1971, c. 196, s. 1.)

Editor's Note.—The 1971 amendment added "Chapter 89A, 'Landscape Architects'" at the end of subdivision (6).

Only the opening paragraph of the section and the subdivision changed by the amendment are set out.

North Carolina Licensing Board Must License Foreign Professional.—See opinion of Attorney General to Mr. Joseph G. Maddrey, Corporation Attorney, Office of Secretary of State, 40 N.C.A.G. 46 (1970).

§ 55B-3. Business Corporation Act applicable.—The Business Corporation Act shall be applicable to such professional corporations, including their organization, and professional corporations shall enjoy the powers and privileges and shall be subject to the duties, restrictions and liabilities of other corporations, except insofar as the same may be limited or enlarged by this chapter. If any provision of this chapter conflicts with the provisions of the Business Corporation Act, the provisions of this chapter shall prevail. (1969, c. 718, s. 3.)

§ 55B-4. Formation of corporation.—A professional corporation under this chapter may be formed pursuant to the provisions of chapter 55, the Business Corporation Act, with the following limitations:

- (1) At least one incorporator shall be a "licensee" as hereinabove defined in § 55B-2 (2).
- (2) All of the shares of stock of the corporation shall be owned and held by a licensee, or licensees, as hereinabove defined in § 55B-2 (2).
- (3) At least one director and one officer shall be a "licensee" as hereinabove defined in § 55B-2 (2).
- (4) The articles of incorporation, in addition to the requirements of chapter 55, shall designate the personal services to be rendered by the professional corporation and shall be accompanied by a certification by the appropriate licensing board that each of the owners of shares of stock is duly licensed to render such professional services. (1969, c. 718, s. 4.)

Editor's Note.—For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

License Foreign Professional.—See opinion of Attorney General to Mr. Joseph G. Maddrey, Corporation Attorney, Office of Secretary of State, 40 N.C.A.G. 46 (1970).

North Carolina Licensing Board Must

§ 55B-5. Corporate name.—The corporate name used by professional corporations under this chapter, except as limited by the licensing acts of the respective professions, shall be governed by the provisions of chapter 55, the Business Corporation Act; provided that professional corporations may use the words "Professional Association" or "P.A." in lieu of the corporate designations specified in chapter 55; and provided further that licensing boards by regulations may make further corporate name requirements or limitations for the respective professions, but such regulations may not prohibit the continued use of any corporate name duly adopted in conformity with the General Statutes and with the pertinent licensing board regulations in effect at the date of such adoption. (1969, c. 718, s. 5.)

§ 55B-6. Capital stock.—A professional corporation may issue shares of its capital stock only to a licensee as hereinabove defined, and such shareholders may voluntarily transfer such shares of stock issued to him only to another such licensee. No share or shares of any stock of such corporation shall be transferred upon the books of the corporation unless and until the corporation has received a certification of the appropriate licensing board that the transferee of such shares

is a licensee as here defined. Any share of stock of such corporation issued or transferred in violation of this section shall be null and void. No shareholder of a professional corporation shall enter into a voting trust agreement or any other type of agreement vesting in another person the authority to exercise the voting power of any or all of his stock. (1969, c. 718, s. 6.)

§ 55B-7. Death or disqualification of a stockholder or employee.—

(a) If any officer, shareholder, agent or employee of a corporation organized under this chapter who is a licensee becomes legally disqualified to render professional services within this State, he shall sever all employment with, and financial interest in, such corporation forthwith. A corporation's failure to comply with this provision shall constitute grounds for the forfeiture of its certificate of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the Secretary of State, the Secretary of State shall forthwith certify that fact to the Attorney General for appropriate action to dissolve the corporation.

(b) A professional corporation shall report to the appropriate licensing board the death of any of its shareholders within 30 days thereafter. Within one year of the date of such death, all of the shares owned by such deceased shareholder shall be transferred to and acquired by the professional corporation or persons qualified to own such shares. In the absence of an agreement which determines the equitable value of the shares, then the price for such shares shall be the fair market value of the stock, but not less than the book value as of the end of the month immediately preceding the death or disqualification. Notwithstanding any other provisions of this chapter, the shares of stock owned by such deceased shareholder may be owned and held by the person or persons who may be legally entitled to receive such shares for a period of one year after the death of such deceased shareholder, or in the case of the death of the owner of all the shares of such corporation, for such period of time as may be necessary to liquidate the corporation. (1969, c. 718, s. 7.)

§ 55B-8. Rendition of professional services. — A professional service corporation may render professional services only through its officers, employees and agents who are duly licensed to render such professional services; provided, however, this provision shall not be interpreted to include in the term "employee," as used herein, clerks, secretaries, bookkeepers, technicians and other assistants who are not considered by law to be rendering professional services to the public. (1969, c. 718, s. 8.)

§ 55B-9. Professional relationship and liability.—Nothing in this chapter shall be interpreted to abolish, modify, restrict, limit or alter the law in this State applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service, or the standards of professional conduct applicable to the rendering therein of such services. (1969, c. 718, s. 9.)

§ 55B-10. Registration with licensing board.—No professional corporation shall open, operate, or maintain an establishment for any of the purposes set forth in this chapter without first having obtained a certificate of registration from the licensing board or boards. Applications for such registration shall be made to the licensing board or boards in writing and shall contain the name and address of the corporation and such other information as may be required by the licensing board or boards. If the board finds that no disciplinary action is pending before the board against any of the licensed incorporators, officers, directors, shareholders or employees of such corporation, and if it appears that such corporation will be conducted in compliance with the law and the regulations of the board, the board shall issue, upon the payment of a registration fee, not to exceed fifty dollars (\$50.00), a certificate of registration which shall remain effective until January 1 following the date of such registration or until such other expiration or renewal date as may be established by law or by the regulations of the licensing board. (1969, c. 718, s. 10.)

§ 55B-11. Renewal of certificate of registration.—Upon written application of the holder, accompanied by a fee not to exceed the sum of twenty-five dollars (\$25.00), the licensing board shall renew the certificate of registration of a professional corporation as required by law or the regulations of the licensing board if the board finds that the corporation has complied with its regulations and the provisions of this section. If the corporation does not apply for renewal of its certificate of registration within thirty days after the date of the expiration of such certificate, the certificate of registration shall be automatically suspended and may be reinstated within the calendar year upon the payment of the required renewal fee plus a penalty of ten dollars (\$10.00), if such corporation is then otherwise qualified and entitled to a renewal of its certificate of registration. (1969, c. 718, s. 11.)

§ 55B-12. Application of regulations of licensing boards.—A professional corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the licensing board as herein defined. Nothing in this chapter shall impair the disciplinary powers of any licensing board applicable to a licensee as herein defined. No professional corporation may do any act which its shareholders as licensees are prohibited from doing. (1969, c. 718, s. 12.)

§ 55B-13. Suspension or revocation of certificate of registration.—A licensing board may suspend or revoke a certificate of registration issued by it to a professional corporation for any of the following reasons:

- (1) Upon the failure of such corporation to promptly remove or discharge an officer, director, shareholder or employee who becomes disqualified by reason of the revocation or suspension of his license to practice; or
- (2) Upon a finding by the licensing board that the professional corporation has failed to comply with the provisions of this chapter or the regulations of the licensing board.

Upon the suspension or revocation of a certificate of registration issued to a professional corporation, such corporation shall cease forthwith to render professional services, and the Secretary of State shall be notified to the end that the corporation may be removed from active status and remain as such until reinstatement. (1969, c. 718, s. 13.)

§ 55B-14. Types of professional services. — A professional corporation shall render only one specific type professional service, and such services as may be ancillary thereto, and shall not engage in any other business or profession; provided, however, such corporation may own real and personal property necessary or appropriate for rendering the type of professional services it was organized to render and it may invest in real estate, mortgages, stocks, bonds, and any other type of investments; provided further, that in the case of architectural, landscape architectural, engineering or land surveying services, as defined in Chapters 83, and 89A respectively, one corporation may be authorized to provide such of these services where such corporation, and at least one corporate officer who is a stockholder thereof, is duly licensed by the licensing board of each such profession. (1969, c. 718, s. 14; 1971, c. 196, s. 2.)

Editor's Note. — The 1971 amendment inserted "landscape architectural" and substituted "89A" for "89."

§ 55B-15. Applicability of chapter.—This chapter shall not apply to any corporation which prior to June 5, 1969 was permitted by law to render professional services as herein defined; provided, however, any such corporation rendering "professional service" as defined in § 55B-2 (6) may be brought within the provisions of this chapter by the filing of an amendment to its articles of incorporation declaring that its shareholders have elected to bring the corporation within the provisions of this chapter and to make the same conform to all of the provisions of this chapter. (1969, c. 718, s. 15.)

Chapter 57.

Hospital, Medical and Dental Service Corporations.

Sec.

57-1. Regulation and definitions; application of other laws; profit and foreign corporations prohibited.

57-3.2. Nurses' services.

§ 57-1. Regulation and definitions; application of other laws; profit and foreign corporations prohibited. — Any corporation heretofore or hereafter organized under the general corporation laws of the State of North Carolina for the purpose of maintaining and operating a nonprofit hospital and/or medical and/or dental service plan whereby hospital care and/or medical and/or dental service may be provided in whole or in part by said corporation or by hospitals and/or physicians and/or dentists participating in such plan, or plans, shall be governed by this Chapter and shall be exempt from all other provisions of the insurance laws of this State, heretofore enacted, unless specifically designated herein, and no laws hereafter enacted shall apply to them unless they be expressly designated therein.

The term "hospital service plan" as used in this Chapter includes the contracting for certain fees for, or furnishing of, hospital care, laboratory facilities, X-ray facilities, drugs, appliances, anesthesia, nursing care, operating and obstetrical equipment, accommodations and/or any and all other services authorized or permitted to be furnished by a hospital under the laws of the State of North Carolina and approved by the North Carolina Hospital Association and/or the American Medical Association.

The term "medical service plan" as used in this Chapter includes the contracting for the payment of fees toward, or furnishing of, medical, obstetrical, surgical and/or any other professional services authorized or permitted to be furnished by a duly licensed physician, except that in any plan in any policy of insurance governed by this Chapter that includes services which are within the scope of practice of a duly licensed optometrist, a duly licensed chiropractor and a duly licensed physician, then the insured or beneficiary shall have the right to choose the provider of the care or service, and shall be entitled to payment of or reimbursement for such care or service, whether the provider be a duly licensed optometrist, a duly licensed chiropractor or a duly licensed physician notwithstanding any provision to the contrary contained in such policy. The term "medical services plan" also includes the contracting for the payment of fees toward, or furnishing of, professional medical services authorized or permitted to be furnished by a duly licensed provider of health services licensed under Chapter 90 of the General Statutes.

The term "dental service plan" as used in this Chapter includes contracting for the payment of fees toward, or furnishing of dental and/or any other professional services authorized or permitted to be furnished by a duly licensed dentist.

The insured or beneficiary of every "medical service plan" and of every "dental service plan," as those terms are used in this Chapter, or of any policy of insurance issued thereunder, that includes services which are within the scope of practice of both a duly licensed physician and a duly licensed dentist shall have the right to choose the provider of such care or service, and shall be entitled to payment of or reimbursement for such care or service, whether the provider be a duly licensed physician or a duly licensed dentist notwithstanding any provision to the contrary contained in any such plan or policy.

The term "hospital service corporation" as used in this Chapter is intended to mean any nonprofit corporation operating a hospital and/or medical and/or dental service plan, as herein defined. Any corporation heretofore or hereafter organized and coming within the provisions of this Chapter, the certificate of in-

corporation of which authorizes the operation of either a hospital or medical and/or dental service plan, or any or all of them, may, with the approval of the Commissioner of Insurance, issue subscribers' contracts or certificates approved by the Commissioner of Insurance, for the payment of either hospital or medical and/or dental fees, or the furnishing of such services, or any or all of them, and may enter into contracts with hospitals for physicians and/or dentists, or any or all of them, for the furnishing of fees or services respectively under a hospital or medical and/or dental service plan, or any or all of them.

No foreign or alien hospital or medical and/or dental service corporation as herein defined shall be authorized to do business in this State. (1941, c. 338, s. 1; 1943, c. 537, s. 1; 1953, c. 1124, s. 1; 1961, c. 1149; 1965, c. 396, s. 1; c. 1169, s. 1; 1967, c. 690, s. 1; 1973, c. 642.)

Editor's Note.—

The first 1965 amendment, effective July 1, 1965, added the exception at the end of the first sentence of the third paragraph. Section 4 of the act provides that it shall not be construed to equate optometrists with physicians except to the extent that each must be duly licensed.

The second 1965 amendment, effective Jan. 1, 1966, inserted the present fifth paragraph. Section 4 of the act provides that the right to payment or reimbursement notwithstanding any provision to the contrary contained in any plan or policy shall be applicable only to those plans and policies entered into, issued, or renewed after the effective date of the act, there being no legislative intent to impair or enlarge obligations under any existing contracts.

The 1967 amendment, effective July 1,

1967, added the second sentence of the third paragraph.

Session Laws 1967, c. 690, s. 4, provides: "Nothing in this act shall be construed to equate podiatrists with physicians except to the extent that each must be duly licensed."

The 1973 amendment inserted "a duly licensed chiropractor" in two places in the third paragraph.

Applicable Provisions of Chapter 58.—

For provisions of chapter 58 of the General Statutes made applicable to medical service plan policies and hospital service plan policies issued under this chapter, see § 58-251.3 and the note thereto.

Applicable Provisions of Chapter 58. —

As to coverage to be afforded to mentally retarded and physically handicapped children, see § 58-251.3.

§ 57-3.2. Nurses' services.—No agency, institution or physician providing a service for which payment or reimbursement is required to be made under a contract governed by this Chapter shall be denied such payment or reimbursement on account of the fact that the service was rendered through a registered nurse acting under authority of rules and regulations adopted by the Board of Medical Examiners and the Board of Nursing pursuant to G.S. 90-6 and 90-162.

Nothing herein shall be construed to authorize contracting with or making payments directly to a nurse not otherwise permitted. (1973, c. 436.)

§ 57-7. Subscribers' contracts; required and prohibited provisions.

Cross Reference.—As to contracts covering newborn infants, see § 58-251.4.

§ 57-12. Licensing of agents.—Every agent of any hospital service corporation authorized to do business in this State under the provisions of this Chapter shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this State and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of one dollar (\$1.00). Before a license is issued to an agent, hereunder, the agent and the company for which he desires to act, shall apply for the license on forms to be prescribed by the Commissioner of Insurance, and before he issues a license to such agent, the Commissioner of Insurance shall satisfy himself by exami-

nation, or otherwise, that the person applying for a license as an agent is a person of good moral character, that he intends to hold himself out in good faith as a hospital and/or medical and/or dental service agent and has sufficient knowledge of the business proposed to be done; that he has not willfully violated any of the insurance laws of the State, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interest. For said examination applicant shall pay the sum of ten dollars (\$10.00): Provided, that where an applicant has already paid the ten dollar (\$10.00) examination fee prescribed in G.S. 105-228.7, such applicant shall not be required to pay an additional examination fee. All agents operating as such for a corporation subject to the provisions of this Chapter on the date of its ratification are deemed qualified to act as such without the examination herein provided for. Licenses issued hereunder shall be subject to revocation by the Commissioner of Insurance for cause after notice and hearing and if any person shall assume to act as an agent or broker without obtaining the license herein provided for, or makes any false statements or representations concerning the said hospital and/or medical and/or dental service, knowingly or willfully, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) for each offense. (1941, c. 338, s. 12; 1943, c. 537, s. 7; 1947, c. 1023, s. 1; 1961, c. 1149; 1971, c. 1080, s. 2.)

Editor's Note.—

The 1971 amendment inserted "after notice and hearing" in the last sentence.

§ 57-13. Revocation of certificate of authority; dissolution.—Whenever the Commissioner of Insurance shall find as a fact that any corporation subject to the provisions of this Chapter, is being operated for profit or fraudulently conducted, or is not complying with the provisions of this Chapter, he shall be authorized to revoke the certificate of authority or license theretofore granted after notice and hearing, and may at any time thereafter institute or cause to be instituted the necessary proceedings under the laws of this State looking to the dissolution of such corporation, and any dissolution, liquidation, merger, or reorganization of a corporation or corporations subject to the provisions of this Chapter shall be under the supervision of the Commissioner of Insurance who shall have all powers with respect thereto granted to him under the insurance laws of this State. If, at any time, a corporation organized under the provisions of this Chapter is financially unable to comply with the provisions of this Chapter or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this Chapter, the Commissioner of Insurance shall have the right without court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this Chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the Commissioner of Insurance is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the Commissioner of Insurance as herein provided, provided, however, that the action taken by the Commissioner of Insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 8; 1971, c. 1080, s. 3.)

Editor's Note.—

The 1971 amendment inserted "after notice and hearing" in the first sentence.

§ 57-14. Taxation.—Every corporation subject to the provisions of this chapter is hereby declared to be a charitable and benevolent corporation and all

of its funds and property shall be exempt from every State, county, district, municipal and school tax or assessment, and all other taxes and license fees, from the payment of which charitable and/or benevolent institutions are now or shall be hereafter exempt. Provided, however, nothing herein contained shall prevent or prohibit corporations subject to the provisions of this chapter from paying for services rendered by municipalities and counties. For the purpose of raising revenues sufficient to defray the expenses of the administration of this chapter, and in lieu of all other taxes, an annual franchise or privilege tax is hereby levied upon every corporation subject to the provisions of this chapter at the rate of one third of one per cent of the gross annual collections from membership dues exclusive of receipts from cost plus plans. The General Assembly of North Carolina does hereby appropriate the sum of four thousand dollars (\$4,000.00) annually from its general funds to be paid over to the Department of Insurance of this State for its use in the discharge of the duties by this chapter imposed upon the Commissioner of Insurance of this State. (1941, c. 338, s. 14; 1965, c. 1128.)

Editor's Note.—

The 1965 amendment, effective July 1, 1965, inserted the present second sentence.

§ 57-19. **Merger or consolidation, proceedings for.** — Any two (2) or more hospital and/or medical and/or dental service corporations organized under and/or subject to the provisions of this chapter as determined by the Commissioner of Insurance may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by the means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation, and the directors and/or trustees, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect and stating such other facts as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, and with such other details as to conversion of certificates of the subscribers as are deemed necessary and/or proper.

Said agreement shall be submitted to the certificate holders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication once a week for two consecutive weeks in some newspaper published in Raleigh, North Carolina, and in the counties in which the principal offices of the constituent corporations are located, and if no such paper is published in the county of the principal office of such constituent corporations, then said notice shall be posted at the courthouse door of said county or counties for a period of two weeks.

Said printed or posted notices shall be in such form and of such size as the Commissioner of Insurance may approve. A true copy of said notices shall be filed with the Commissioner of Insurance.

Such publication and filing of notices shall be completed at least fifteen (15) days prior to the date set therein for the meeting, and due proof thereof shall be filed with the Commissioner of Insurance at least ten days prior to the date of such meeting.

At this meeting those present in person or represented by proxy shall constitute a quorum and said agreement shall be considered and voted upon by ballot in person or by proxy or both taken for the adoption or rejection of the same; and if the votes of two thirds of those at said meeting voting in person or by proxy shall be for the adoption of the said agreement, then that fact shall be certi-

fied on said agreement by the president and secretary of each such corporation, under the seal thereof.

The agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice-president of each such corporation before any officer authorized by the laws of this State to take acknowledgment of deeds to be the respective act, deed, and agreement of each of said corporations.

The said agreement shall be submitted to and approved by the Commissioner of Insurance, in advance of the merger or consolidation and his approval thereof shall be indicated by his signature being affixed thereto under the seal of his office.

The Commissioner shall not approve any such plans, unless, after a hearing, he finds that it is fair, equitable to certificate holders and members, consistent with law, and will not conflict with the public interest.

The agreement so certified and acknowledged with the approval of the Commissioner of Insurance noted thereon, shall be filed in the office of the Secretary of State, and shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said corporations; and a copy of said agreement and act of consolidation or merger duly certified by the Secretary of State under the seal of his office shall also be recorded, in the office of the register of deeds of the county of this State in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the office of the registers of deeds of the counties of this State in which the respective corporations so merging or consolidating shall have their original certificates of incorporation recorded, and also in the office of the register of deeds in each county in which either or any of the corporations entering into merger or consolidation owns any real estate; and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger. When an agreement shall have been signed, authorized, adopted, acknowledged, approved, and filed and recorded as hereinabove set forth in this section, for all purposes of the laws of this State, the separate existence of all constituent corporations, parties to said agreement, or of all such constituent corporations, except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, shall be vested in the corporation resulting from or surviving such consolidation or merger, and all property, rights, privileges, powers, and franchises and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this State, vested in any such constituent corporations shall not revert or be in any way impaired by reason of such consolidation or merger; provided, however, that all rights of creditors and all liens upon the property of either of or any of said constituent corporations shall be preserved, unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or

contracted by it; and further provided that notice of any said liens, debts, liabilities, and duties is given in writing to the resulting or surviving corporation within six months after the date of the filing of the agreement of merger in the office of the Secretary of State. All such liens, debts, liabilities, and duties of which notice is not given as provided herein are forever barred. The certificate of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that the changes in its certificates of incorporation are stated in the agreement of merger. All certificates theretofore issued and outstanding by each constituent corporation in good standing upon the date of the filing of such agreement with the Secretary of State without reissuance thereof by the resulting or surviving corporation shall be the contract and agreement of the resulting or surviving corporation with each of the certificate holders thereof and subject to all terms and conditions thereof and of the agreement of merger filed in the office of the Secretary of State.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment as if such consolidation or merger had not taken place, or the corporations resulting from or surviving such consolidation or merger may be substituted in its place.

The liability of such constituent corporations to the certificate holders thereof, and the rights or remedies of the creditors thereof, or persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this section, except as provided in this section.

When two or more corporations are consolidated or merged, the corporation resulting from or surviving such consolidation or merger shall have the power and authority to continue any contracts which any of the constituent corporations might have elected to continue. All contracts entered into between any constituent corporations and any other persons shall be and become the contract of the resulting corporations according to the terms and conditions of said contract and the agreement of consolidation or merger.

For the filing of the agreement as hereinabove provided, the Secretary of State is entitled to receive such fees only as he would have received had a new corporation been formed.

Any agreement for merger and/or consolidation as shall conform to the provisions of this section, shall be binding and valid upon all the subscribers, certificate holders and/or members of such constituent corporations, provided only that any subscriber, certificate holder and/or member who shall so indicate his disapproval thereof to the resulting, consolidated or surviving corporation within ninety days after the filing of said agreement with the Secretary of State shall be entitled to receive all unearned portions of premiums paid on his certificate from and after the date of the receipt of the application therefor by the resulting, surviving, or consolidated corporation; each subscriber, certificate holder and/or member who shall not so indicate his or her disapproval of said agreement and said merger within said period of ninety days is deemed and presumed to have approved said agreement and said merger and/or consolidation and shall have waived his or her right to question the legality of said merger and/or consolidation.

No director, officer, subscriber, certificate holder and/or member as such of any such corporation, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation. (1947, c. 820, s. 8; 1961, c. 1149; 1967, c. 823, s. 25.)

Cross Reference.—See Editor's note to § 53-5.

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for

"clerk of the superior court" and "registrars of deeds" for "clerks of the superior courts" in the first sentence of the ninth paragraph.

Chapter 58.

Insurance.

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Unauthorized Insurers.

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- 58-54.25:1. [Repealed.]

Article 3D.

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- 58-86.3 Exchange of securities.
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- 58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments.

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- 58-173.8. Persons eligible to apply to Association for coverage; contents of application.
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- 58-173.11. Appeal from acts of Association to Commissioner; appeal from Commissioner to superior court.
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- 58-173.13. Association and Commissioner immune from liability.
- 58-173.14. Association to file annual report with Commissioner.
- 58-173.15. Commissioner may examine affairs of Association.
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Article 18B.

Fair Access to Insurance Requirements.

- 58-173.17. Purpose of article.
- 58-173.18. Organization of underwriting association.
- 58-173.19. Participation in association.
- 58-173.20. Requirements of Plan and authority of association.
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- 58-173.22. Temporary directors of association.
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- 58-211.3. Assignment of interest in group policies and annuity contracts.

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- 58-224.1. North Carolina Mutual Burial

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- Association Commission; membership; election; duties.
- 58-224.2. Duties of Commission; meetings; Burial Commissioner; secretary.
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- 58-228. Assessments against associations for expenses of Burial Commissioner.
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North Carolina Motor Vehicle Reinsurance Facility.

- 58-248.26. Definitions.
- 58-248.27. North Carolina Motor Vehicle Reinsurance Facility; creation; membership.
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58-248.38. Physical damage insurance availability.

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Article 26.

Nature of Policies.

58-251.3. Policy coverage to continue as to mentally retarded or physically handicapped children.

58-251.4. Policies to cover newborn infants.

58-251.5. Insurers and others to afford coverage to mentally retarded and physically handicapped children.

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 1.

Title and Definitions.

§ 58-1. Title of the Chapter.

Editor's Note.—

For case law survey as to insurance, see 44 N.C.L. Rev. 1022 (1966); 45 N.C.L. Rev. 955 (1967).

§ 58-2. Definitions.—In this Chapter, unless the context otherwise requires, (6a) "Nuclear insured" means a public utility procuring insurance against radioactive contamination and other risks of direct physical loss at a nuclear electric generating plant.

(1971, c. 510, s. 1.)

Editor's Note.—

The 1971 amendment added subdivision (6a).

§ 58-3. Contract of insurance.

Contract to Indemnify Assured for Loss Is Insurance Contract.—That portion of a contract under which a company agrees to indemnify the assured for loss or damage from perils therein defined, with provision for subrogation of the company to the right of assured against third persons, constitutes a contract of insurance. *American Nat'l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963).

But Contract to Pay Claims for Which

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58-259.2. Nurses' services.

58-260. Discrimination forbidden; right to choose services of optometrist, podiatrist, dentist or chiropractor.

SUBCHAPTER VII. FRATERNAL
ORDERS AND SOCIETIES.

Article 28.

Fraternal Orders.

58-267. Meetings of governing body; principal office.

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

Only the opening paragraph and the subdivision added by the amendment are set out.

Assured Liable Is Surety Contract. — A contract under which a company obligates itself to pay to any shipper or consignee, claims for which the assured would be liable by provision of § 62-111, with stipulation that the assured should reimburse the company for any such payment, is a surety contract and not a contract of insurance. *American Nat'l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963).

ARTICLE 2.

Commissioner of Insurance.

§ 58-4. Department established.

Quoted in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-5. Commissioner's election and term of office.

Quoted in *Allstate Ins. Co. v. Lanier*,
242 F. Supp. 73 (E.D.N.C. 1965).

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-6. **Salary of Commissioner.** — The salary of the Commissioner of Insurance shall be thirty-one thousand dollars (\$31,000) a year, payable in equal monthly installments. (1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; c. 771, s. 3; Rev., s. 2756; 1907, c. 830, s. 10; c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; C. S., s. 3874; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 6; 1967, c. 1130; c. 1237, s. 6; 1969, c. 1214, s. 6; 1971, c. 912, s. 6; 1973, c. 778, s. 6.)

Editor's Note.—

Both 1967 amendments increased the salary from \$18,000 to \$20,000. The first amendatory act provided that the increase should be effective Jan. 1, 1969, and the second amendatory act was made effective July 1, 1967.

The 1969 amendment, effective after

July 1, 1969, increased the salary from \$20,000 to \$22,500.

The 1971 amendment, effective July 1, 1971, increased the salary from \$22,500 to \$25,000.

The 1973 amendment, effective July 1, 1973, increased the salary from \$25,000 to \$31,000.

§ 58-7. **Bond of Commissioner.**—The Commissioner of Insurance, before he enters upon the execution of his official duties, must give a bond to the State in the sum of twenty-five thousand dollars, with sufficient surety, to be approved by the State Treasurer, conditioned upon the faithful performance of the duties of his office during his term of office; this bond extends to the faithful execution of the office of Commissioner of Insurance by the person elected or appointed thereto until a new election or appointment of Commissioner of Insurance is made and a new bond given. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. (1899, c. 54, s. 55; 1905, c. 430, s. 2; Rev., s. 293; C. S., s. 6265; 1969, c. 844, s. 7.)

Editor's Note. — The 1969 amendment added the second sentence.

§ 58-7.1. Chief deputy commissioner.

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-7.2. Chief actuary.

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-7.3. Other deputies, actuaries, examiners and employees.

Cross Reference.—As to assistant attorney general assigned to Commissioner and Insurance Department, see § 114-4.2a.

Quoted in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-9. Powers and duties of Commissioner.

—The Commissioner shall:

- (1) See that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provision of this Chapter which will prevent practices injurious to the public by insurance companies, fraternal orders and societies, agents, adjusters and motor vehicle damage appraisers. The Commissioner may likewise, from time to time, withdraw, modify or amend any such regulation.

- (2) Have the power and authority to make and promulgate rules and regulations pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Furnish to the companies, associations, orders or bureaus required by this Chapter to report to him, the necessary blank forms for the statements required, which forms may be changed by him from time to time when necessary to secure full information as to the standing, condition and such other information desired of companies, associations, orders or bureaus under the Insurance Department.
- (4) Receive and thoroughly examine each annual statement required by this Chapter and prepare an abstract of each annual statement at the expense of the company, association, order or bureau making the same and receive therefor the sum or four dollars (\$4.00). If the annual statement is made in compliance with the laws of this State, the Commissioner shall publish the abstract of the same, at the expense of the company, association, order or bureau making it, in one of the newspapers of the State, which newspaper may be selected by the company, association, order or bureau making the statement, if within 30 days after the filing of the statement, the Commissioner is notified in writing of the name of the paper selected.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance, and he shall have power to institute civil actions or criminal prosecutions either by the Attorney General or such other attorney as the Attorney General may select, for any violation of the provisions of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.
- (7) Administer by himself or by his deputy all oaths required in the discharge of his official duty. (1899, c. 54, § 8; 1905, c. 430, s. 3; Rev., s. 4689; C. S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1.)

Editor's Note.—

The 1965 amendment added present subdivision (2) and renumbered the remaining subdivisions.

The 1971 amendment, effective April 1, 1972, substituted "adjusters and motor vehicle damage appraisers" for "and adjusters" in subdivision (1).

Commissioner of Insurance had no authority to enjoin an insurance company from entering into an agreement to lease property owned by the company's president and treasurer. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Quoted in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965); *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968); *State ex rel. Lanier v. Vines*, 1 N.C. App. 208, 161 S.E.2d 35 (1968); *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

Cited in *Marks v. Thompson*, 232 N.C. 174, 192 S.E.2d 311 (1972); *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-9.1. Orders of Commissioner; when writing required.

Quoted in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-9.2. **Examinations, investigations and hearings; notice of hearing.**—All examinations, investigations and hearings provided for by this chapter may be conducted by the Commissioner personally or by one or more of

his deputies, investigators, actuaries, examiners or employees designated by him for the purpose. If the Commissioner or any investigator appointed to conduct such investigations is of the opinion that there is evidence to charge any person or persons with a criminal violation of the insurance laws he may arrest with warrant or cause such person or persons to be arrested. All hearings shall, unless otherwise specially provided, be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the person cited to appear, at least ten days before the date designated therein. The notice shall state the subject of inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it to such person or by depositing the same in the United States mail, postage prepaid, and addressed to the last known place of business of such person. (1945, c. 383; 1969, c. 1009.)

Editor's Note. — The 1969 amendment inserted "investigators" in the first sentence and added the second sentence.

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-9.3. Court review of orders and decisions.—(a) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the Commissioner or in his absence upon someone in active charge of the Department within five days after the filing thereof. If such petition for review is not filed within the said 30 days, the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(b) The Commissioner shall within 30 days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in subsection (a) of this section, prepare and file with the clerk of the Superior Court of Wake County a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing,

- (1) Upon consent of the parties; or
- (2) When the convenience of witnesses and the ends of justice would be promoted by the change; or
- (3) When the judge has at any time been interested as a party or counsel.

The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the Commissioner is incomplete, he may by appropriate order direct the Commissioner to certify any or all parts of the record so omitted.

(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof.

(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Commissioner may be taken to the Appellate Division of the General Court of Justice by any party to the action as in other civil cases.

(e) The commencement of proceedings under this section shall not operate as a stay of the Commissioner's order or decision, unless otherwise ordered by the court. (1945, c. 383; 1947, c. 721; 1969, c. 44, s. 55; 1971, c. 703, s. 1.)

Editor's Note.—

The 1968 amendment substituted "Appellate Division of the General Court of Justice" for "Supreme Court of North Carolina" in subsection (d).

The 1971 amendment, effective Jan. 1, 1972, inserted in the first sentence of subsection (a) the language beginning "and except an order or decision" and ending "not in the public interest." The amendment also substituted "otherwise" for "so" and deleted "except orders increasing or reducing rates and orders affecting the continuation of the license of a rating organization" in subsection (e).

The Commissioner's projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence and if he has taken into account all of the rel-

evant facts which he is directed by statute to consider. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965); In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Stated in Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967); In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-9.4. Court review of rates and classification.—Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby. Any such order shall be based on findings of fact, and if applicable, findings as to trends related to the matter under investigation, and conclusions of law based thereon. Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper. For the purposes of the appeal the Insurance Commissioner, who shall be represented by his general counsel, shall be deemed an aggrieved party. (1971, c. 703, s. 2.)

Editor's Note. — Session Laws 1971, c. 703, s. 6, makes the act effective Jan. 1, 1972.

Applied in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

§ 58-9.5. Procedure on appeal under G.S. 58-9.4.—Appeals to the North Carolina Court of Appeals pursuant to G.S. 58-9.4 shall be subject to the following provisions:

- (1) No party to a proceeding before the Commissioner may appeal from any final order or decision of the Commissioner unless within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commissioner, by order made within 30 days, the party aggrieved by such decision or order shall file with the Commissioner notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or un-

warranted, and including errors alleged to have been committed by the Commissioner.

- (2) Any party may appeal from all or any portion of any final order or decision of the Commissioner in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commissioner, to each party to the proceeding to the addresses as they appear in the files of the Commissioner in the proceeding. The failure of any party, other than the Commissioner, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.
- (3) The Commissioner may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commissioner.
- (4) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The appellant shall cause to be prepared a statement of the case as required by the rules of the Court of Appeals. A copy of this statement shall be served on the Commissioner and all other parties, as appellees, within 45 days from the entry of the appeal taken; within 20 days after such service, the appellee shall return the copy with its approval or specified amendments endorsed or attached; if the case be approved by the appellee it shall be filed by the appellant with the clerk of the Court of Appeals as part of the record; if not returned with objection within the time prescribed, it shall be deemed approved. The Commissioner shall have the power, in the exercise of its discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.
- (5) If the case on appeal is returned by appellee with objections as prescribed, or if a counter case is served on appellant, the appellant shall immediately request the Commissioner to fix a time and place for meeting to agree on the case on appeal. If the appellant delays longer than 15 days after the appellee serves its counter case or exceptions to request the Commissioner to set a meeting to agree on the case on appeal, then the exceptions filed by the appellee shall be allowed, or the counter case served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.
- (6) The Commissioner shall forthwith notify the attorneys of the parties to meet before it for the purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the Commissioner shall determine if all parties have agreed on a case on appeal. If they have, the appellant shall within five days thereafter file it with the clerk of the Court of Appeals, and if he fails to do so the appellee may file its copy. If the case on appeal is not agreed upon by all parties to the appeal at said meeting, the Commissioner shall immediately file with the Court of Appeals a request for appointment of a referee to settle the case on appeal, whereupon the chief judge of the Court of Appeals shall appoint a referee to settle and sign the case on appeal under such rules as may be set forth in his appointment.
- (7) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals.
- (8) Unless otherwise provided by the rules of the Court of Appeals, the cause on appeal from the Commissioner of Insurance shall be entitled "State of North Carolina ex rel. Commissioner of Insurance (here add any additional parties in support of the Commissioner's order and their capacity before the Commissioner). Appellee(s) v. (here insert name

of appellant and his capacity before the Commissioner), Appellant." Appeals from the Insurance Commissioner pending in the superior courts on January 1, 1972, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. Appeals to the Court of Appeals under G.S. 7A-29 shall be docketed in accordance with the rules of the Court of Appeals.

(9) In any appeal to the Court of Appeals, the complainant in the original complaint before the Commissioner shall be a party to the record and each of the parties to the proceeding before the Commissioner shall have a right to appear and participate in said appeal.

(10) An appeal under this section shall operate as a stay of the Commissioner's order or decision until said appeal has been dismissed or the questions raised by the appeal determined according to law. (1971, c. 703, s. 3.)

Editor's Note. — Session Laws 1971, c. 703, s. 6, makes the act effective Jan. 1, 1972.

§ 58-9.6. **Extent of review under G.S. 58-9.4.**—(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commissioner, not shown in the record, shall be considered under the rules of the Court of Appeals.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commissioner, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commissioner.

(d) The court shall also compel action of the Commissioner unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of this Chapter shall be prima facie correct. (1971, c. 703, s. 4.)

Editor's Note. — Session Laws 1971, c. 703, s. 6, makes the act effective Jan. 1, 1972.

§ 58-10. **Commissioner to supervise local inspectors.**—The Commissioner shall exercise general supervision over local investigators of fires and fire prevention inspectors. Whenever the Commissioner has reason to believe that the local inspectors are not doing their duty, he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of the law relative to the

investigation of fires and the prevention of fire waste enforced. (1905, c. 506, s. 6; Rev., s. 4690; C. S., s. 6270; 1925, c. 89; 1969, c. 1063, s. 2.)

Editor's Note. — The 1969 amendment rewrote the first sentence of this section.

§ 58-13. Admissibility of certificate as evidence of agent's authority.

Editor's Note.—This catchline is set out in the Supplement to correct an error in the replacement volume.

§ 58-16. Examinations to be made.

Cited in *In re Hardware Mut. Ins. Co.*,
278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-16.2. Results of examination not to be made public until company is given opportunity to be heard; exception.

Cited in *In re Hardware Mut. Ins. Co.*,
278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-21. Annual statements to be filed with Commissioner.

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-26. Commissioner may require records, reports, etc., for agencies, agents and others.—(a) The Commissioner is empowered to make and promulgate reasonable rules and regulations governing the recording and reporting of insurance business transactions by insurance agencies, agents, brokers and producers of record, any of which agencies, agents, brokers or producers of record are defined by G.S. 58-39.4 and are licensed in this State or are transacting insurance business in this State to the end that such records and reports will accurately and separately reflect the insurance business transactions of such agency, agent, broker or producer of record in this State. Information from records required to be kept pursuant to the provisions of this section must be furnished the Commissioner on demand and the original records required to be kept pursuant to the provisions of this section shall be open to the inspection for the Commissioner or any other authorized employee described in G.S. 58-7.3 when demanded.

(b) Every insurance agency as defined by G.S. 58-39.4(a) transacting insurance business in this State shall at all times have appointed some person employed or associated with such agency who shall have the responsibility of seeing that such records and reports as are required pursuant to the provisions of this section are kept and maintained.

(c) Any person subject to the provisions of subsection (a) of this section who violates the provisions of this section or the rules and regulations prescribed by the Commissioner pursuant to the provisions of this section may after notice and hearing: For the first offense have his license or licenses (in case license be issued for more than one company in such person's case) suspended or revoked for not less than one month nor more than six months and for the second offense shall have his license or licenses (in case license be issued from more than one company in his case) suspended or revoked for the period of one year and such person shall not thereafter be licensed for one year from the date said revocation or suspension first became effective.

(d) For the purpose of enforcing the provisions of this section the Commissioner or any other authorized employee described in G.S. 58-7.3 is authorized and empowered to examine persons, administer oaths and require production of papers and records relative to this section. (1971, c. 948, s. 1.)

Editor's Note.—Session Laws 1971, c. 948, s. 2, makes the act effective Jan. 1, 1972.

§ 58-27.1. Insurance advisory board; organization and powers.

State Government Reorganization.—The insurance advisory board was transferred to the Department of Insurance by § 143A-76, enacted by Session Laws 1971, c. 864.

Rules of Evidence.—Section 143-317 and § 143-318 are not applicable to a public

hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the Rate Office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

ARTICLE 3.

General Regulations for Insurance.

§ 58-30. Statements in application not warranties.

Editor's Note. — For note "Life Insurance Applications: Opinion Answers or

Material Misrepresentations," see 49 N.C.L. Rev. 560 (1971).

§ 58-31. Stipulations as to jurisdiction and limitation of actions.

Requiring Insured to Join as Defendant Person Allegedly Responsible for Damage.—The provision of an automobile liability policy which required the insured, in an action against the insurer, to join as a party defendant the person or organization allegedly responsible for the damage to the

insured, was held void as a violation of this section, where the party defendant was a nonresident uninsured motorist and not amenable to the jurisdiction of this State. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

§ 58-31.1. Proof of loss forms required to be furnished.

Waiver of Policy Provision Requiring Proof of Loss.—The insurer waived policy provision requiring proof of loss to be furnished within 60 days, where (1) the insured went to the insurer's agent, who had sold him the policy, and notified him of the loss; (2) the insured notified the insurer in writing of his loss; and (3) the insurer failed to furnish to the insured

proof of loss forms. McElrath v. State Capital Ins. Co., 13 N.C. App. 211, 184 S.E.2d 912 (1971).

Applied in Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973).

Cited in Northern Assur. Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

§ 58-32. Insurance as security for a loan by the company.

Editor's Note.—For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Stated in Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 58-38. Revocation of license of domestic company; injunction and receiver.

Commissioner Has No Statutory Power to Issue Restraining Orders or Injunctions.—The statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner do not purport to grant him the power of issuing restraining orders and injunctions. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

But May Apply to Courts for Such.—In administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions under the provisions of this section. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-39.4. Definitions.—(a) An insurance agency is hereby defined to be any person, partnership, or corporation designated in writing by any insurance company lawfully licensed to do business in this State, to act as its agent, with authority to solicit, negotiate, and effect contracts of insurance on behalf of the insurance company through duly licensed agents of such company, and to collect the premiums thereon, or to do any of such acts.

(b) An insurance broker is hereby defined to be an individual who being a li-

censed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

(c) A general agent is hereby defined to be an individual designated in writing by an insurance company lawfully licensed to do business in this State to act for it as agent or manager and with additional authority to appoint, designate, or supervise local agents within a specified territory.

(d) A special agent is hereby defined to be an individual other than an officer, manager, or general agent of the insurer, employed by an insurer or general agent to work with and assist agents in soliciting, negotiating, and effectuating insurance in such insurer or in the insurers represented by the general agent.

(e) A life insurance agent is hereby defined to be a person engaged in the business of selling any or all types of insurance offered by life insurance companies, including life, annuities, health, accident and hospital insurance.

(f) A credit life insurance agent is hereby defined to be a person engaged in selling any or all of the following types of insurance or collateral security for a loan in connection with which such insurance is written :

- (1) Credit term life;
- (2) Credit accident and health; and
- (3) Hospital insurance.

(g) An accident and health insurance agent is hereby defined to be a person engaged in the business of selling accident and health insurance and hospital insurance as defined in G.S. 58-72(3).

(h) A hospital or medical care agent is hereby defined to be a person representing a hospital or medical service association selling prepaid hospital or medical care service.

(i) A fire and casualty insurance agent is hereby defined to be a person engaged in the business of selling any type of insurance offered by a fire and casualty company.

(j) A credit insurance agent is hereby defined to be a person engaged in the business of selling credit insurance as defined in G.S. 58-72(17) not including credit life, credit accident and health or hospital insurance.

(k) A physical damage insurance agent is hereby defined to be a person engaged in the business of selling physical damage insurance on a motor vehicle.

(l) A title insurance agent is hereby defined to be a person engaged in the business of selling title insurance.

(m) An insurance adjuster is hereby defined to be any individual, who for salary, fee, commission, or other compensation of any nature, as an independent contractor, or as an employee of an independent contractor or as an employee of an insurer or as an adjuster for any insured investigates or reports to his principal relative to claims arising under insurance contracts other than life or annuity. It shall be unlawful and cause for revocation of license for a licensed insurance adjuster to engage in the practice of law.

(n) An attorney-at-law who adjusts insurance losses from time to time incidental to the practice of his profession, an adjuster of marine losses, or a special agent who adjusts for companies for which he is licensed as agent is not deemed to be an "adjuster" for the purposes of this Chapter.

(o) In this Chapter, unless the context otherwise requires, a motor vehicle damage appraiser is hereby defined to be an individual who for salary, fee, commission, or other compensation of any nature or as an independent contractor or as an employee of an independent contractor regularly investigates or advises relative to the nature and amount of damage to motor vehicles located in this State or the amount of money deemed necessary to effect repairs thereto and is not

- (1) An adjuster licensed to adjust insurance claims in this State;
- (2) An agent for an insurance company who is not required by law to be licensed as an adjuster;

(3) An attorney-at-law who is not required by law to be licensed as an adjuster; and

(4) A person who incident to his regular employment in the business of actually repairing defective or damaged motor vehicles investigates and advises relative to the nature and amount of motor vehicle damage or the amount of money deemed necessary to effect repairs thereto.

(p) Nothing in the above definitions shall be construed to prohibit any individual from applying for and upon passing any required examination from receiving license under any or all of the above definitions or classifications.

(q) A regular salaried officer or employee of a licensed mutual or reciprocal insurer who travels for his insurer in this State shall not be deemed an insurance agent if

(1) He has other duties than soliciting insurance,

(2) Any policies of insurance written by him are signed by a licensed insurance agent who is a bona fide resident of this State and

(3) He receives no commission or other compensation directly dependent upon the amount of business obtained.

(r) Nothing in this section shall be construed to in any way prevent or restrict any insurance agent, general agent, or adjuster from continuing to engage in the business of selling the same kind and type of insurance as authorized by the license now held by him on or after April 1, 1957, except as provided in G.S. 58-41.1(b).

(s) A producer of record is hereby defined to be an individual who is licensed as a fire and casualty insurance agent and as a resident insurance broker under the insurance laws of this State and who is designated by an assigned-risk applicant as the producer of record on an assigned-risk application. (1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 1; 1957, c. 299; 1965, c. 1047; 1971, c. 757, s. 2; c. 926, s. 1.)

Editor's Note.—

The 1965 amendment, effective April 1, 1966, added subsection (s).

The first 1971 amendment, effective April 1, 1972, changed the form of the statutory references in subsections (g) and (j), added present subsection (o) and redesignated former subsections (o), (p) and (q) as subsections (p), (q) and (r).

The second 1971 amendment, effective April 1, 1972, deleted "covering property, the title of which is conveyed or retained as security for a loan, or of selling credit insurance" preceding "as defined" in subsection (j).

Cited in *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 58-40. Agents and others must procure license.—(a) Every agent of any insurance company authorized to do business in this State shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office, showing that the company for which he is agent is licensed to do business in this State and that he has been appointed an agent of such company as defined in G.S. 58-39.4 and is duly authorized to act for such company within the scope of the agency designated on such license.

(b) Every insurance adjuster shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that he is duly authorized to act as an adjuster.

(c) Every motor vehicle damage appraiser shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that he is duly authorized to act as a motor vehicle damage appraiser.

(d) Every such agent, motor vehicle damage appraiser, or adjuster, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit insurance or with whom he deals as an adjuster or motor vehicle damage appraiser. (1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8; c. 774; Rev., s.

4706; 1915, c. 109, s. 7; c. 166, s. 1; C. S., s. 6298; 1951, c. 105, s. 1; 1953, c. 1043, s. 2; 1971, c. 757, s. 3.)

Editor's Note.—

The 1971 amendment, effective April 1, 1972, added present subsection (c), and redesignated former subsection (c) as (d), adding "motor vehicle damage appraiser"

near the beginning and at the end of that subsection.

Cited in *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 58-40.2. Bond required of brokers.—(a) Every applicant for a resident broker's license or for the renewal thereof shall file with the application and shall thereafter maintain in force while so licensed a bond in favor of the State of North Carolina for the use of aggrieved parties, executed by an authorized corporate surety approved by the Commissioner, in the amount of one thousand dollars (\$1,000.00). The bond may be continuous in form, and total aggregate liability on the bond may be limited to the payment of five thousand dollars (\$5,000.00). The bond shall be conditioned on the accounting by the broker to any person requesting the broker to obtain insurance, for moneys or premiums collected in connection therewith, or to any insurer or association of insurers under any plan or plans for the placement of insurance under the laws of North Carolina.

(b) Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is canceled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon 30 days' advance notice in writing filed with the Commissioner. (1947, c. 922; 1951, c. 781, s. 6; 1971, c. 950.)

Editor's Note.—

The 1971 amendment added "or to any insurer or association of insurers under any

plan or plans for the placement of insurance under the laws of North Carolina" in the third sentence of subsection (a).

§ 58-40.5. Exceptions to requirements for licensing.

What Constitutes Insurable Interest.—

As a general rule, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss

from its destruction. *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972).

§ 58-40.6. Motor vehicle damage appraiser's qualifications.—An individual desiring to be licensed as a motor vehicle damage appraiser must apply to the Commissioner for issuance of said license on forms prescribed by the Commissioner. Before issuing a license, the Commissioner shall satisfy himself that such license if issued shall serve the public interest and that the individual applying for the license as a motor vehicle damage appraiser:

- (1) Be 21 years of age or over;
- (2) Be a bona fide resident of and actually reside in this State except as provided in G.S. 58-51.2;
- (3) Be a trustworthy person;
- (4) Has not willfully violated any of the insurance laws of this State;
- (5) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possess the competence necessary to fulfill the responsibilities of a motor vehicle damage appraiser; and
- (6) Has advanced the fees provided in G.S. 105-228.7. (1971, c. 757, s. 4.)

Editor's Note.—Session Laws 1971, c.

757, s. 10 makes the act effective April 1, 1972.

§ 58-41. Agent's and adjuster's qualifications.—Before a license is issued to an insurance agent, general agent, or insurance adjuster in this State, the agent, general agent, or adjuster shall apply for license on forms to be prescribed by the Commissioner. In all cases where application is made for the license

mentioned herein by an insurance agent or general agent, the company for which the agent or general agent desires to act shall also apply for the license on forms to be prescribed by the Commissioner. Upon the filing of an application of an insurance adjuster there shall also be an application, as above prescribed, by the insurance company for which that adjuster proposes to adjust in the event that the adjuster is to be an employee of that company. Upon the filing of an application of an adjuster who is to work as an employee of any person, firm, or corporation other than an insurance company, then the employer shall make an application on form prescribed by the Commissioner. Before he issues a license to such agent, general agent, or insurance adjuster, the Commissioner shall satisfy himself that such license, if issued, shall serve the public interest and that the person applying for the license as an agent, general agent, or insurance adjuster:

(1) Be 18 years of age or over ;

(2) Meet residence requirements as follows :

a. For insurance adjusters: Be a bona fide resident of and actually reside in this State except as provided in G.S. 58-51.2.

b. For agents and general agents: Be a bona fide resident of and actually reside in this State for a period of 12 months next preceding the date when he applies for license, except as provided in G.S. 58-43: Provided, however, that the said 12-month waiting period shall not apply if the applicant for license files a good and sufficient bond of one thousand dollars (\$1,000.00) with the Commissioner of Insurance, which bond shall be subject to forfeiture upon a finding by the Commissioner of Insurance that the licensed person or agent has moved his domicile or residence from this State within the period of the year for which license was issued; provided, however, that no such agent shall be required to file more than one bond under this section, irrespective of the number of licenses issued to him or the number of companies he may represent. Upon such forfeiture, the Commissioner of Insurance shall pay said penal amount of such bond to the board of education of the county where the agent resided. The provisions of this paragraph shall also be applicable to the agents of hospitals and medical and/or dental service corporations operating under Chapter 57 of the General Statutes, as amended. In lieu of the requirements of this paragraph that all agents shall file the bond herein prescribed, all insurance companies licensed to write accident, health or hospitalization insurance in this State may file a blanket bond covering such of their agents who are duly authorized to sell accident, health or hospitalization insurance.

(3) Successfully pass an examination as required under G.S. 58-41.1;

(4) Be a trustworthy person;

(5) Has not willfully violated any of the insurance laws of this State;

(6) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possesses the competence necessary to fulfill the responsibilities of an agent, general agent or adjuster: Provided, that upon the expiration of any license of an agent, general agent, or insurance adjuster, the Commissioner of Insurance may grant a license to such agent, general agent, or insurance adjuster for a period not exceeding 12 months, upon an application of the company desiring to license such agent, or general agent, or upon the application of the employer of such insurance adjuster, and without any application from the agent, general

agent, or insurance adjuster, upon such forms and in accordance with such rules as may be determined by the Commissioner of Insurance and upon the payment by either the insurance company or the agent, general agent, or insurance adjuster of the proper fees.

No license may be issued to any agent whose premium writings represented by the premiums on contracts of insurance signed, countersigned, issued or sold by him or the agency employing him for the general public during the preceding year shall not exceed those on insurance signed, countersigned, issued or sold by the agency covering his own property or life and the property or lives of members of his immediate family, his employer, his employees, and stockholders or employees of his employer. This limitation shall not apply to agents originally licensed and duly qualified prior to April 1, 1945.

In addition to the bond requirements of paragraph b of subdivision (2) of this section, all agents licensed to sell accident, health or hospitalization insurance in this State or certificates or service plans of a medical and/or dental service corporation shall be required to file with the Commissioner of Insurance a bond in the amount of five hundred dollars (\$500.00), which shall be subject to forfeiture in whole or in part upon a finding made by the Commissioner of Insurance that such agent has wilfully misrepresented the terms of an accident, health or hospitalization insurance policy, or service plan or certificate of a medical and/or dental service corporation, offered for sale; provided, however, that no such agent shall be required to file more than one bond under this section, irrespective of the number of licenses issued to him or the number of companies he may represent. Upon such forfeiture being made final by the Commissioner of Insurance or his authorized deputy, the forfeiture shall be paid to the board of education of the county of the agent's residence. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7; c. 166, s. 7; C. S., s. 6299; 1931, c. 185; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 5; 1955, c. 850, ss. 1, 4; 1957, c. 96; 1961, c. 1149; 1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" in subdivision (1).

Opinions of Attorney General.—Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 321 (1969).

Cited in *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 58-41.1. **Examinations for license.**—(a) Each applicant for license as agent, general agent or adjuster shall, prior to the issuance of any such license, personally take and pass to the satisfaction of the Commissioner an examination in writing given by the Commissioner as a test of his qualifications and competence; but this requirement shall not apply to:

- (1) Applicants for license under G.S. 58-41.2 and as agents for companies or associations specified in G.S. 58-131.9;
- (2) Applicants who have, within the three-year period next preceding the date of application, not including time spent in military service of the United States during war, been licensed in this State in the same capacity and to engage in the same kinds of insurance for which they were previously licensed;
- (3) Applicants for an agent's, general agent's or adjuster's license covering the same kinds of insurance as authorized by the license then held by them except as provided in subsection (b) of this section;
- (4) Applicants for license to write ocean marine insurance whenever the Commissioner deems the applicant to be qualified by past experience to deal in such insurance.
- (5) Applicants (who are bona fide residents and actually residing in this State) for an agent's, general agent's, or adjuster's license covering

the same kinds of insurance as authorized by the license or certificate granted him upon the successful passing of a written examination given by the insurance department of another state, or by the American College of Life Underwriters, Life Underwriters Training Council, American Institute of Property and Liability Underwriters, Institute of Insurance of America, or any insurance institute conducted at a recognized college or university in the State of North Carolina and meeting the standards as approved by the Commissioner of Insurance.

- (6) Applicants for license as credit life insurance agents, credit accident and health insurance agents and credit insurance agents as defined in subdivision (17) of G.S. 58-72.

(d) The answers of the applicant to any such examination shall be written by the applicant under the Commissioner's supervision. The Commissioner shall give examinations at such times and places within this State as he deems necessary reasonably to serve the convenience of both the Commissioner and applicants. The Commissioner shall require a waiting period of at least 30 days' duration before giving a new examination to an applicant who has failed to pass a previous similar examination.

(1969, c. 1206; 1971, c. 926, s. 2.)

Editor's Note.—

The 1969 amendment substituted "30 days" for "ninety days" in the third sentence of subsection (d).

The 1971 amendment, effective April 1, 1972, substituted "credit insurance agents

as defined in subdivision (17) of G.S. 58-72" for "credit property insurance agents" in subdivision (6) of subsection (a).

As the rest of the section was not changed by the amendments, only subsections (a) and (d) are set out.

§ 58-42. Revocation of license.—When the Commissioner is satisfied that any insurance agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker or nonresident broker licensed by this State has willfully violated any of the insurance laws of this State or regulation of the Commissioner, or has willfully overinsured property or has willfully misrepresented any policy of insurance, or has dealt unjustly with or willfully deceived any person in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or, on demand, has failed or refused to pay over or deliver to the company which he represents, or has represented, any money or property in his hands belonging to the company, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in this Chapter, or has obtained or attempted to obtain any license through willful misrepresentation or fraud, the Commissioner may immediately suspend his license or licenses and shall forthwith give to such licensee 10 days' notice of the charge or charges and of a hearing thereon, and if the Commissioner finds there has been any of the violations hereinbefore set forth, he shall specifically set out such finding and shall revoke the license of such agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker or nonresident broker and his license for all the companies which he represents in this State. Such agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker, or nonresident broker shall have the right to have such revocation reviewed as provided in G.S. 58-9.3. For the purposes of investigation under this section the Commissioner shall have all the power conferred upon him by G.S. 58-44.4. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; C. S., s. 6300; 1929, c. 301, s. 1; 1943, c. 434; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1971, c. 757, s. 5.)

Editor's Note.—

The 1971 amendment, effective April 1, 1972, inserted "motor vehicle damage appraiser" in two places and "or regulation of the Commissioner" and "and his license" in one place in the first sentence, and in-

serted "motor vehicle damage appraiser" in the second sentence.

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Section 143-317(3) shows that § 143-318 was intended to apply only

to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." In re Filing by Auto.

Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Motions for Continuance and Bill of Particulars Are Addressed to Commissioner's Discretion.—In a hearing before the Commissioner of Insurance in proceedings for the revocation of an agent's license, the agent having been given more than the ten-day statutory notice, motions for a continuance and for a bill of particulars are addressed to the sound discretion of the Commissioner, and the denial of the motions will not be disturbed in the absence of a showing of abuse. *Elmore v. Lanier*, 270 N.C. 674, 155 S.E.2d 114 (1967).

Quoted in *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-44.4. Revocation of license for violation; power of Commissioner.

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Section 143-317(3) shows that § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-44.4A. Notice and hearing prior to revocation of license, etc. — In all cases where a license may be suspended or revoked by the Commissioner of Insurance pursuant to the provisions of this Chapter, such suspension or revocation of such license shall not be ordered until after notice and opportunity to be heard has been given such licensee. (1971, c. 1080, s. 1.)

§ 58-44.5. Rebates prohibited.

Stated in *Goforth v. Avemco Life Ins. Co.*, 368 F.2d 25 (4th Cir. 1966).

§ 58-44.6. Imposition of civil penalty.

Constitutionality.—The attempted grant to the Commissioner of Insurance of judicial power to impose upon an insurance agent for a violation of the insurance laws a penalty, varying in the Commissioner's discretion from a nominal sum to \$25,000, violates the State Constitution, there being no reasonable necessity for conferring such judicial power upon the Commissioner. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968). But see *State ex rel. Lanier v. Vines*, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

party in interest and is entitled to bring an action in the superior court to enforce the collection of a civil penalty imposed pursuant to this section. *State ex rel. Lanier v. Vines*, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

Penalty to Be Paid Over to State Treasurer. — By clear implication of §§ 58-62 and 58-63, the amount of any monetary civil penalty imposed and collected as authorized by this section should be paid over to the State Treasurer. *State ex rel. Lanier v. Vines*, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

The Commissioner of Insurance is a real

§ 58-44.7. Rebate of premiums on credit life and credit accident and health insurance; retention of funds by agent.

A bank could not have legally made a refund of money which had gone, even through its hands, to an insurance company as premiums on credit life insurance. It is unlawful for an insurance company writing credit life insurance in connection

with a loan to permit any agent to pay any rebate or refund any premiums without the consent of the policyholders. *Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co.*, 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 58-47. Representing unlicensed company prohibited; penalty.

Cited in *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968); *State ex*

rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-48. Agent failing to exhibit license.

Commissioner Cannot Require Prosecution or Punishment.—The Commissioner of Insurance has no authority to require the solicitor to institute or prosecute a criminal

action nor to require a judge to punish the defendant upon conviction. *Elmore v. Lanier*, 270 N.C. 674, 155 S.E.2d 114 (1967).

§ 58-49. False statements in applications for insurance.—If any agent, examining physician, applicant, or other person shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for insurance, or shall make any such statement for the purpose of obtaining any fee, commission, money or benefit from any company engaged in the business of insurance in this State, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, at the discretion of the court. The provisions of this section shall be applicable to contracts and certificates issued pursuant to chapters 57 and 58 of the General Statutes. (1899, c. 54, s. 60; Rev., s. 3487; C. S., s. 6307; 1945, c. 458; 1947, c. 922; 1965, c. 911.)

Cross Reference.—As to false or fraudulent statements in connection with claims for insurance benefits, see § 14-112.1.

Editor's Note.—

The 1965 amendment, effective July 1, 1965, rewrote this section.

§ 58-51.2. Nonresident adjusters and motor vehicle damage appraisers.—(a) The Commissioner may license a nonresident as an insurance adjuster upon his compliance with all the requirements of this Chapter applicable to resident adjusters. No license shall be required of an adjuster licensed as such in another state for the adjustment in this State of a single loss, or of losses arising out of a catastrophe common to all such losses: Provided such adjuster notifies the Commissioner of Insurance in writing prior to the adjusting of such loss or losses. The Commissioner of Insurance may permit an experienced adjuster, who regularly adjusts in another state and who is licensed in such other state (if such state requires a license), to act as adjuster in this State without a North Carolina license, for emergency insurance adjustment work, for a period of not exceeding 30 days, done for an employer who is an insurance adjuster licensed by the State of North Carolina or who is a regular employer of one or more insurance adjusters licensed by the State of North Carolina; provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of any such "emergency insurance adjustment work."

(b) The Commissioner may license a nonresident as a motor vehicle damage appraiser upon his compliance with all the requirements of this Chapter applicable to resident motor vehicle damage appraisers and may permit an experienced motor vehicle damage appraiser who regularly appraises in another state (if such state requires a license) to act as a motor vehicle damage appraiser in this State without a North Carolina license for emergency motor vehicle damage appraisal work for a period not exceeding 30 days done for an employer who is

- (1) An insurance adjuster licensed by the State of North Carolina,
- (2) A motor vehicle damage appraiser licensed by the State of North Carolina,
- (3) A regular employer of one or more insurance adjusters licensed by the State of North Carolina, or
- (4) A regular employer of one or more motor vehicle damage appraisers licensed by the State of North Carolina;

Provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of any such emergency appraisal work. (1947, c. 922; 1951, c. 105, s. 1; 1957, c. 360; 1971, c. 757, s. 6.)

Editor's Note.—

The 1971 amendment, effective April 1,

1972, designated the former section as subsection (a), and added subsection (b).

§ 58-52. Agent, adjuster, etc., acting without a license or violating insurance law.—If any person shall assume to act either as principal, agent, broker, adjuster or motor vehicle damage appraiser without license as is required by law or pretending to be a principal, agent, broker, adjuster or licensed motor vehicle damage appraiser, shall solicit, examine or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, investigate or advise relative to the nature and amount of damages to motor vehicles or the amount necessary to effect repairs thereto, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing any contract of insurance of any kind otherwise than the law permits, or as principal or agent shall violate any provision of law contained in this Chapter, the punishment for which is not elsewhere provided for, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 115; Rev., s. 3490; C. S., s. 6310; 1945, c. 458; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1971, c. 757, s. 7.)

Editor's Note.—

The 1971 amendment, effective April 1, 1972, substituted "broker, adjuster or motor vehicle damage appraiser" for "broker or adjuster" in two places, and inserted

"investigate or advise relative to the nature and amount of damages to motor vehicles or the amount necessary to effect repairs thereto."

§ 58-52.1. Process against nonresident licensees.—(a) Each licensed nonresident agent, adjuster, motor vehicle damage appraiser, or broker shall by the act of acquiring such license thereby be deemed to appoint the Commissioner as his attorney to receive service of legal process issued against the agent, adjuster, motor vehicle damage appraiser, or broker in this State upon causes of action arising within this State.

(b) The appointment shall be irrevocable for as long as there could be any cause of action against the agent, adjuster, motor vehicle damage appraiser, or broker arising out of his insurance transactions in this State.

(c) Duplicate copies of such legal process against such agent, adjuster, motor vehicle damage appraiser, or broker shall be served upon the Commissioner either by a person competent to serve a summons, or through registered mail. At the time of such service the plaintiff shall pay to the Commissioner a fee of one dollar, taxable as costs in the action to defray the expense of such service.

(d) Upon receiving such service, the Commissioner shall forthwith send one of the copies of the process, by registered mail with return receipt requested, to the defendant agent, adjuster, motor vehicle damage appraiser, or broker at his last address of record with the Commissioner.

(e) The Commissioner shall keep a record of the day and hour of service upon him of all such legal process. No proceedings shall be had against the defendant agent, adjuster, motor vehicle damage appraiser, or broker, and such defendant

shall not be required to appear, plead or answer until the expiration of 40 days after the date of service upon the Commissioner. (1947, c. 922; 1971, c. 757, s. 8.)

Editor's Note.— The 1971 amendment, which changed "motor vehicle damage appraiser" throughout the effective April 1, 1972, inserted "motor vehicle damage appraiser" section.

§ 58-53.1. Citizens authorized to procure policies in unlicensed foreign companies.

(d) Exemption.—A nuclear insured shall be exempt from the requirements of this and other sections of Article 3, and nothing contained in Article 3 shall be interpreted as prohibiting a nuclear insured from procuring policies of insurance on risks on its own nuclear electric generating plants and other facilities at such plants in this State in foreign or alien insurance companies not authorized to transact business in this State. (1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7; c. 680; Rev., ss. 4715, 4769; C. S., s. 6425; 1945, c. 378; 1961, c. 1150, s. 1; 1971, c. 510, s. 2.)

Editor's Note.—

The 1971 amendment added subsection (d).

changed by the amendment, only subsection (d) is set out.

As the other subsections were not

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-53.2. Punishment for failure to file affidavit and statements.

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

ARTICLE 3A.

Unfair Trade Practices.

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.

- (10) Soliciting, etc., Unauthorized Insurance Contracts in Other States.—Soliciting, advertising or entering into insurance contracts in foreign states and any other jurisdiction in which such domestic insurer is not licensed in accordance with the laws of such state or jurisdiction, except as provided in G.S. 58-54.27. (1949, c. 1112; 1955, c. 850, s. 3; 1967, c. 935, s. 2.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added subdivision (10). Section 5, c. 935, Session Laws 1967, provides that the act shall not apply to any contracts of in-

surance in effect before its effective date.

As the rest of the section was not changed by the amendment, only subdivision (10) is set out.

§ 58-54.6. Hearings, witnesses, appearances, production of books and service of process.

Stated in State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

ARTICLE 3B.

Unauthorized Insurers False Advertising Process Act.

§ 58-54.14. Purpose; construction.—(a) The purpose of this article is to subject to the jurisdiction of the Commissioner of Insurance and to the jurisdiction of the courts of this State, insurers not authorized to transact business in this State which place in or send into this State any false advertising designed to induce residents of this State to purchase insurance from insurers not authorized to transact business in this State. The General Assembly declares it is in the interest of the citizens of this State who purchase insurance from insurers which solicit insurance business in this State in the manner set forth in the preceding sentence that such insurers be subject to the provisions of this article. In furtherance of such interest,

the General Assembly in this article provides a method of substituted service of process upon such insurers and declares in so doing, it exercises its power to protect its residents and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, chapter 20, 1st Session, § 340, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states; the authority provided herein to be in addition to any existing powers of this State.

(b) The provisions of this article shall be liberally construed. (1965, c. 910.)

§ 58-54.15. Definitions.—As used in this article:

- (1) "Residents" shall mean and include person, partnership or corporation, domestic, alien or foreign.
- (2) "Unfair Trade Practice Act" shall mean article 3A of this chapter. (1965, c. 910.)

§ 58-54.16. Unlawful advertising; notice to unauthorized insurer and domiciliary insurance supervisory official.—No unauthorized foreign or alien insurer shall make, issue, circulate or cause to be made, issued or circulated, to residents of this State any estimate, illustration, circular, pamphlet, or letter, or cause to be made in any newspaper, magazine or other publication or over any radio or television station, any announcement or statement to such residents misrepresenting its financial condition or the terms of any contracts issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon in violation of the Unfair Trade Practice Act, and whenever the Commissioner shall have reason to believe that any such insurer is engaging in such unlawful advertising, it shall be his duty to give notice of such fact by registered mail to such insurer and to the insurance supervisory official of the domiciliary state of such insurer. For the purpose of this section, the domiciliary state of an alien insurer shall be deemed to be the state of entry or the state of the principal office in the United States. (1965, c. 910.)

§ 58-54.17. Action by Commissioner under Unfair Trade Practice Act.—If after thirty days following the giving of the notice mentioned in § 58-54.16 such insurer has failed to cease making, issuing, or circulating such false misrepresentations or causing the same to be made, issued or circulated in this State, and if the Commissioner has reason to believe that a proceeding by him in respect to such matters would be to the interest of the public, and that such insurer is issuing or delivering contracts of insurance to residents of this State or collecting premiums on such contracts or doing any of the acts enumerated in § 58-54.18, he shall take action against such insurer under the Unfair Trade Practice Act. (1965, c. 910.)

§ 58-54.18. Acts appointing Commissioner as attorney for service of statement of charges, notices and process; manner of service; limitation on entry of order or judgment.—(a) Any of the following acts in this State, effected by mail or otherwise, by any such unauthorized foreign or alien insurer:

- (1) The issuance or delivery of contracts of insurance to residents of this State,
- (2) The solicitation of applications for such contracts,
- (3) The collection of premiums, membership fees, assessments or other considerations for such contracts, or
- (4) Any other transaction of insurance business,

is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all statements of charges, notices and lawful process in any proceeding instituted in respect to the misrepresentations set forth in § 58-54.16 hereof under the provisions of the Unfair Trade Practice Act, or in any action, suit or proceeding for the recovery of any penalty therein provided, and any such act shall be signification of its agreement that such service of state-

ment of charges, notices or process is of the same legal force and validity as personal service of such statement of charges, notices or process in this State, upon such insurer.

(b) Service of a statement of charges and notices under said Unfair Trade Practice Act shall be made by any deputy or employee of the Insurance Department delivering to and leaving with the Commissioner or some person in apparent charge of his office, two copies thereof. Service of process issued by any court in any action, suit or proceeding to collect any penalty under said Act provided, shall be made by delivering and leaving with the Commissioner, or some person in apparent charge of his office, two copies thereof. The Commissioner shall forthwith cause to be mailed by registered mail one of the copies of such statement of charges, notices or process to the defendant at its last known principal place of business, and shall keep a record of all statements, charges, notices and process so served. Such service of statement of charges, notices or process shall be sufficient provided they shall have been so mailed and the defendant's receipt or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the person mailing such letter showing a compliance herewith are filed with the Commissioner in the case of any statement of charges or notices, or with the clerk of the court in which such action is pending in the case of any process, on or before the date the defendant is required to appear or within such further time as may be allowed.

(c) Service of statement of charges, notices and process in any such proceeding, action or suit shall in addition to the manner provided in subsection (b) of this section be valid if served upon any person within this State who on behalf of such insurer is

(1) Soliciting insurance, or

(2) Making, issuing or delivering any contract of insurance, or

(3) Collecting or receiving in this State any premium for insurance;

and a copy of such statement of charges, notices or process is sent within ten days thereafter by registered mail by or on behalf of the Commissioner to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter, the name and address of the person to whom the letter is addressed, and the affidavit of the person mailing the same showing a compliance herewith, are filed with the Commissioner in the case of any statement of charges or notices, or with the clerk of the court in which such action is pending in the case of any process, on or before the date the defendant is required to appear or within such further time as the court may allow.

(d) No cease or desist order or default judgment under this section shall be entered until the expiration of thirty days from the date of the filing of the affidavit of compliance.

(e) Service of process and notice under the provisions of this article shall be in addition to all other methods of service provided by law, and nothing in this article shall limit or prohibit the right to serve any statement of charges, notices or process upon any insurer in any other manner now or hereafter permitted by law (1965, c. 910.)

§ 58-54.19. **Short title.**—This article may be cited as the Unauthorized Insurers False Advertising Process Act. (1965, c. 910.)

ARTICLE 3C.

Unauthorized Insurers.

§ 58-54.20. **Purpose of article.**—It is the purpose of this article to abate and prevent the practices of unauthorized insurers within the State of North

Carolina, and to provide methods for effectively enforcing the laws of this State against such practices. The General Assembly finds that there is within this State a substantial amount of insurance business being transacted by insurers who have not complied with the laws of this State and have not been authorized by the Commissioner of Insurance to do business. These practices by unauthorized insurers are deemed to be harmful and contrary to public welfare of the citizens of this State. The difficulties which arise from the acts and practices of unauthorized insurers is compounded by the fact that such companies are licensed in foreign jurisdictions and conduct a long-range business without having personal representatives or agents in proximity to insureds. The General Assembly further declares that it is a subject of vital public interest to the State that unlicensed and unauthorized companies have been and are now engaged in soliciting by way of direct mail and other advertising media, insurance risks within this State, and that such companies enjoy the many benefits and privileges provided by the State as well as the protection afforded to citizens under exercise of the police powers of the State, without themselves being subject to the laws designed to protect the insurance consuming public. The provisions of this article are in addition to all other statutory provisions of chapter 58 relating to unauthorized insurers and do not replace, alter, modify or repeal such existing provisions. (1967, c. 909, s. 1.)

Editor's Note. — Section 4, c. 909, Session Laws 1967, provides: "This act shall be effective on and after July 1, 1967, but the same shall not apply to any contracts of insurance in effect before the effective date of this act."

§ 58-54.21. Transacting business without certificate of authority prohibited; exceptions.—Except as hereinafter provided, it shall be unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this State as set forth in G.S. 58-54.22 of this Article, without a certificate of authority issued by the Commissioner of Insurance. This section shall not apply to the following acts or transactions:

- (1) The procuring of a policy of insurance upon a risk within this State where the applicant is unable to procure coverage in the open market with admitted companies and is otherwise in compliance with G.S. 58-53.1;
- (2) Contracts of reinsurance;
- (3) Transactions in this State involving a policy lawfully solicited, written and delivered outside of this State covering only subjects of insurance not resident, located or expressly to be performed in this State at the time of issuance, and which transactions are subsequent to the issuance of such policy;
- (4) Transactions in this State involving group or blanket insurance and group annuities where the master policy of such group insurance was lawfully issued and delivered in a state where the company was authorized to transact business;
- (5) Transactions in this State involving all policies of insurance issued prior to July 1, 1967;
- (6) The procuring of contracts of insurance issued to an "industrial insured" as hereinafter defined, or to a nuclear insured.

For the purposes of this section, an "industrial insured" is an insured (i) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer, (ii) whose aggregate annual premiums for insurance on all risks total at least twenty-five thousand dollars (\$25,000.00), and (iii) who has at least 25 full-time employees: Provided,

nothing herein shall relieve such industrial insured from complying with the provisions of G.S. 58-53.1. (1967, c. 909, s. 1; 1971, c. 510, s. 3.)

Editor's Note. — The 1971 amendment added "or to a nuclear insured" at the end of subdivision (6).

§ 58-54.22. Acts or transactions deemed to constitute transacting insurance business in this State.—The following acts, if performed in this State, shall be included among those deemed to constitute transacting insurance business in this State:

- (1)
 - a. Maintaining any agency or office where any acts in furtherance of an insurance business are transacted, including, but not limited to the execution of contracts of insurance with citizens of this or any other state;
 - b. Maintaining files or records of contracts of insurance; or
 - c. Receiving payments of premiums for contracts of insurance.
- (2) Likewise, any of the following acts in this State, whether effected by mail or otherwise by an unauthorized insurer, is included among those deemed to constitute transacting insurance business in this State;
 - a. The issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein;
 - b. The soliciting of applications for contracts of insurance through the use of the United States mail or any other media, method or device;
 - c. The collections of premiums, membership fees, assessments or other considerations for such contracts; or
 - d. The transaction of any matters prior to or subsequent to the execution of such contracts in contemplation thereof or arising out of them.

Any company violating any of the provisions of this section, by doing any of the foregoing acts or transactions while not authorized to do business within this State, shall be subject to penalty of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) for each offense; such penalty shall be payable to the Commissioner of Insurance, who shall in turn forward the same to the county or counties wherein the violation or violations occur, for the use of the public schools of such county or counties: Provided, that each day in which a violation occurs shall constitute a separate offense. The Attorney General of the State of North Carolina at the request of and upon information from the Commissioner of Insurance shall initiate a civil action in behalf of the Commissioner in any county of the State wherein a violation under this section occurs to recover the penalty provided. Service of process upon the unauthorized insurer shall be had as is provided in § 58-54.25. (1967, c. 909, s. 1.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the next to the last sentence of the section.

§ 58-54.23. Validity of acts or contracts of unauthorized company shall not impair obligation of contract as to the company; maintenance of suits; right to defend.—The failure of a company to obtain a certificate of authority shall not impair the validity of any acts or contracts of the company. Any person or insured holding contracts of insurance of an unauthorized insurer may bring an action in the courts of this State under the provisions of G.S. 58-153.1, known as the "Unauthorized Insurers Process Act," for the enforcement of any rights pursuant to the contract of insurance. The failure of the insurance company to obtain a certificate of authority shall not prevent such company

from defending any action at law or suit in equity in any court of this State so long as the said company fully complies with the provisions of § 58-153.1 (c). but no company transacting insurance business in this State without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State to enforce any right, claim or demand arising out of the transaction of such business until such company shall have obtained a certificate of authority. Nor shall an action at law or in equity be maintained in any court of this State by any successor or assignee of such company on any such right, claim or demand originally held by such company until a certificate of authority shall have been obtained by the company or by a company which has acquired all or substantially all of its assets. Nothing in this section shall be construed to abrogate the conditions of admission into this State nor to impair the authority of the Commissioner of Insurance with respect to the issuance of certificates of authority. The Commissioner of Insurance in considering the issuance of a certificate of authority shall take into consideration the acts or transactions which an unauthorized company has engaged in in this State prior to its application for a certificate of authority. (1967, c. 909, s. 1.)

§ 58-54.24. Commissioner empowered to enjoin unauthorized companies.—Whenever the Commissioner of Insurance, from evidence satisfactory to him, has reasonable grounds for believing that any foreign or alien company is violating or is about to violate the provisions of § 58-54.21, the Commissioner may through the Attorney General of this State cause a complaint to be filed in the Superior Court of Wake County to enjoin and restrain such company from continuing such violations or engaging therein, or doing any act in furtherance thereof. The court shall have jurisdiction of the proceedings and shall have the power to make and enter an appropriate order or judgment granting preliminary or final injunctive relief as in its discretion is proper: Provided, however, that the company alleged to be in violation shall have been served with process as is provided hereinafter. (1967, c. 909, s. 1.)

§ 58-54.25. Service of process upon unauthorized company by Commissioner of Insurance.—(a) Any act of entering into a contract of insurance as an insurer or transacting insurance business in this State, as set forth in G.S. 58-54.22 by an unauthorized, foreign or alien company, shall be equivalent to and shall constitute an appointment by such company of the Secretary of State to be its true and lawful attorney upon whom may be served all lawful process in any action or proceeding against it arising out of a violation of G.S. 58-54.21, and any of said acts shall be a signification of its agreement that any such process against it, which is so served, shall be of the same legal force and validity as if in fact served upon the company.

(b) Service of process on the Secretary of State shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail, with return receipt requested, to such insurer at its last known principal place of business as shown on the process, notice or demand served on the Secretary of State. The Commissioner of Insurance and the Attorney General shall see that such address is included on the process, notice or demand which is served upon the Secretary of State. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the insurer with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(c) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered mail, or upon the return of

such registered mail showing refusal thereof by such foreign or alien insurer, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(d) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign or alien insurer to accept delivery of the registered mail provided for in subsection (b) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign or alien insurer refusing to accept delivery of such registered mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(e) Whenever service of process is made upon the Secretary of State as herein provided the defendant foreign or alien insurer shall have 30 days from the date when the defendant receives or refuses to accept the registered mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the defendant's return receipt or the refused registered mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered mail shall be deemed to be the date that the return receipt or the registered mail was received back by the Secretary of State.

(f) The court in any action or proceeding in which service is made in the manner provided in the above paragraph may, in its discretion, order such postponement as may be necessary to afford such company reasonable opportunity to defend such action or proceeding.

(g) The Secretary of State shall keep a summarized record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(h) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon an insurer in any other manner now or hereafter permitted by law.

(i) No judgment by default shall be entered in any such action or proceeding until the expiration of 30 days from the date of the filing of the affidavit of compliance. (1967, c. 909, s. 1.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in subsection (b).

§ 58-54.25:1: Repealed by Session Laws 1971, c. 1204, effective July 1, 1973.

ARTICLE 3D.

Unauthorized Insurance by Domestic Companies.

§ 58-54.26. **Purpose of article.**—It is the purpose of this article to effectively control and regulate the activities of domestic insurance companies so as to prevent them from engaging in and transacting insurance business in states and jurisdictions in which they are not authorized to do a business of insurance. The General Assembly recognizes that insofar as domestic companies of this State engage in transacting insurance business in states and jurisdictions in which they are

not authorized to do business that such activity subjects the domestic companies of this State to the penalties for such unlawful activities in other states and jurisdictions, and that such activities tend to substantially impair the effectiveness of the domestic companies in this State. The General Assembly also recognizes that the practices of unauthorized insurers could be largely corrected if each state would effectively regulate the activities of its domestic companies. The provisions of this article are in addition to all other statutory provisions designed to control the activities of domestic companies and nothing herein shall be construed to amend, modify or repeal the provisions of existing laws. (1967, c. 935, s. 1.)

Editor's Note.—Section 5, c. 935, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967 but shall not apply to any contracts of insurance in effect before that date.

§ 58-54.27. Domestic insurers prohibited from transacting business in foreign states without authorization; exceptions.—Except as hereinafter provided, no domestic insurer organized under the laws of this State shall transact or attempt to transact or solicit business in any manner or accept risks in any jurisdiction in which such insurer is not licensed in accordance with the laws of such jurisdiction. There is excepted from the terms of this section the following acts and transactions:

- (1) Contracts entered into by a domestic company insuring a risk within a foreign state or jurisdiction, where the law of the foreign state or jurisdiction permits an unauthorized insurer to so contract;
- (2) Contracts entered into where the prospective insured is personally present in the state in which the insurer is authorized to transact business when he signs the application;
- (3) Contracts of reinsurance between a licensed insurer of the foreign state or jurisdiction and a domestic company;
- (4) The issuance of certificates under a lawfully transacted group life or group disability policy, where the master policy was entered into in a state in which the insurer was then authorized to transact business;
- (5) The renewal or continuance in force, with or without modification, of contracts otherwise lawful and which were not originally executed in violation of this section. (1967, c. 935, s. 1.)

§ 58-54.28. Domestic insurers; advertising; exceptions.—No domestic insurer shall knowingly solicit or advertise its insurance business in a state or jurisdiction in which it is not licensed as an authorized insurer. Provided, however, that this section shall not prohibit a domestic insurer from advertising through publications, radio or television if such advertising is not expressly directed toward the residents or subjects of insurance in a foreign state or other jurisdiction. Nor shall this section apply to trade journals or directories. (1967, c. 935, s. 1.)

§ 58-54.29. Penalties provided for unauthorized acts.—Whenever any domestic insurer shall knowingly engage in the practice of soliciting, advertising or making contracts for insurance in states or jurisdictions in which it is not licensed, the North Carolina Commissioner of Insurance shall be authorized, as hereinafter provided, to issue an order requiring such company to cease and desist from engaging in such activities and, for the purposes of this section, the acts prohibited by G.S. 58-54.28 and the foregoing sections, are declared to be an unfair trade practice within the meaning of G.S. 58-54.4 and G.S. 58-54.9. Provided; whenever the Commissioner shall have reason to believe that any domestic company has been engaged or is engaging in the practice of knowingly soliciting, advertising or writing contracts of insurance on risks within a state or jurisdiction in which it is not licensed, he shall proceed to serve such company with notice of hearing and the hearing shall in all respects conform with the hearing procedure set forth in G.S. 58-54.6. Any action taken by the Commissioner of Insurance after

such hearing shall be in compliance with G.S. 58-54.7, and any company aggrieved by an order of the Commissioner shall be entitled to that judicial review as is provided in G.S. 58-54.8. (1967, c. 935, s. 1.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the first sentence of this section.

ARTICLE 4.

Insurance Premium Financing.

§ 58-55. Definitions.

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56. License required; fees.

(e) There shall be two types of licenses issued to an insurance premium finance company:

- (1) An "A" type license shall be issued to insurance premium finance companies whose business of insurance premium financing is limited to the financing of insurance premiums of one insurance agent or agency and whose primary function is to finance only the insurance premium of such agent or agency. The license fee for an "A" type license shall be two hundred dollars (\$200.00) for each license year or part thereof.
- (2) A "B" type license shall be issued to an insurance premium finance company whose business of insurance premium financing is not limited to the financing of insurance premiums of one insurance agent or agency and whose primary function is to finance the insurance premiums of more than one insurance agent or agency. The license fee for a "B" type license shall be nine hundred fifty dollars (\$950.00) for each license year or part thereof.

A branch office license may be issued for either an "A" type or "B" type license. The fee for the branch office license shall be fifty dollars (\$50.00) for each license year or part thereof. The examination fee when required by this section shall be one hundred dollars (\$100.00) per application. (1963, c. 1118; 1967, c. 1232, s. 1.)

Cross Reference.—As to exemption of insurance premium finance companies licensed under this article from the license tax on loan agencies or brokers, see § 105-88 (b).

Editor's Note. — The 1967 amendment, effective July 1, 1967, rewrote subsection (e).

As only subsection (e) was changed by the amendment, the rest of the section is not set out.

Fees Are Intended to Pay Expenses of

Supervision.—The fees exacted of insurance premium financiers by this section and of persons engaged in business under the Consumers Finance Act by § 53-167 are intended to pay the necessary expenses of licensing, regulating, and supervising the business. Although any surplus collected under this section reverts to the general treasury of the State under § 58-61.1, this is merely an incidental budgetary provision. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56.1. Exceptions to license requirements.—(a) Any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, installment paper dealers, auto finance companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations, organized under the laws of North Carolina or any person, firm or corporation subject to the provisions of the North Carolina Consumer Finance Act and the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law, Article 12, Chapter 20, of the General Statutes of North Carolina are exempt from the provisions of this Article.

(b) An insurance company duly licensed in this State may make an install-

ment payment charge as set forth in the rate filings and approved by the Commissioner and are thereby exempt from the provisions of this Article.

(c) A fire and casualty insurance agent or an insurance broker duly licensed in this State who extends credit to and only to his own policyholders may charge and collect finance charges or other fees at a periodic (monthly) rate as provided in G.S. 24-11(a), after said amount has been outstanding for 30 days, and is hereby exempt from the provisions of this Article. Notwithstanding the exceptions set forth in subsections (a), (b) and (c) of this section, when any person, firm, or corporation shall exercise a power of attorney taken in connection with the financing of an insurance premium, such person, firm or corporation shall comply with the requirements of G.S. 58-60, as if it were an insurance premium financing company. (1963, c. 1118; 1967, c. 942, s. 1; 1971, c. 1186, ss. 1, 2.)

Editor's Note. — The 1967 amendment added the former last sentence in subsection (b).

The 1971 amendment deleted a former last sentence of subsection (b) concerning the exercise of a power of attorney, and added subsection (c).

Section 3 of the 1967 amendatory act provides that it "shall be effective on and after July 1, 1967, and shall apply to contracts of insurance premium financing entered into on or after said date."

Those Subject to This Article Are Not Intended to Be Subject to Consumer Fi-

nance Act.—Had the legislature intended to subject to the provisions of the Consumer Finance Act those who make loans solely to finance insurance premiums, surely it would not have enacted this Article in the first instance since it exempts from its provisions those subject to the Consumer Finance Act. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56.2. Issuance or refusal of license; bond; duration of license; renewal; one office per license; display of license; notice of change of location.—(a) Within sixty (60) days after the filing of an application for a license accompanied by payment of the fees for license and examination, the Commissioner shall issue the license or may refuse to issue the license and so advise the applicant. The applicant shall submit with such application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public offered by the person filing such application. The Commissioner may require a bond not to exceed twenty-five thousand dollars (\$25,000.00) on applications and any renewal thereof. Such license to engage in business in accordance with the provisions of this article at the location specified in the application shall be executed in duplicate by the Commissioner and he shall transmit one copy to the applicant and retain a copy on file.

(1965, c. 1039.)

Editor's Note. — The 1965 amendment added the third sentence in subsection (a).

As the rest of the section was not affected by the amendment, it is not set out.

§ 58-58.1. Form, contents and execution of insurance premium finance agreements.

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-59. Limitations on service charges; computation; minimum charges.

(c) The service charge provided for in this section shall be computed on the principal balance of the insurance premium finance agreement from the inception date of the insurance contract, the premiums for which are advanced or to be advanced under the agreement unless otherwise provided under rules and regulations prescribed by the Commissioner, to and including the date when the final installment of the insurance premium finance agreement is payable, at a rate not exceeding ten dollars (\$10.00) per one hundred dollars (\$100.00) per annum; pro-

vided that when the principal balance is one hundred twenty dollars (\$120.00) or less, a licensee may charge, in lieu of the charge specified above, rates not exceeding, two dollars (\$2.00) for each ten dollars (\$10.00) on that part of the principal balance not exceeding forty dollars (\$40.00); one dollar (\$1.00) for each ten dollars (\$10.00) on that part of the principal balance exceeding forty dollars (\$40.00) but not exceeding seventy dollars (\$70.00); fifty cents (50¢) for each ten dollars (\$10.00) on that part of the principal balance exceeding seventy dollars (\$70.00) but not exceeding one hundred twenty dollars (\$120.00). All service charges may be rounded off to the nearest dollar and are subject to a minimum charge as follows: Three dollars (\$3.00) when the principal balance is less than twenty dollars (\$20.00); six dollars (\$6.00) when the principal balance is twenty dollars (\$20.00) or more, but less than one hundred twenty dollars (\$120.00); fourteen dollars (\$14.00) when the principal balance is one hundred twenty dollars (\$120.00) or more.

(1967, c. 824.)

Editor's Note. — The 1967 amendment substituted "may" for "are to" following "All service charges" at the beginning of the second sentence in subsection (c).

As only subsection (c) was affected by the amendment, the rest of the section is not set out.

§ 58-59.2. Delivery of copy of insurance premium finance agreement to insured.—Before the due date of the first installment payable under an insurance premium finance agreement, the insurance premium finance company holding the agreement or the insurance agent shall deliver to the insured, or mail to him at his address as shown in the agreement, a copy of the agreement. (1963, c. 1118.)

Editor's Note.—This section is set out to supply an omission in the replacement volume.

§ 58-60. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.

(1) Not less than ten (10) days' written notice be mailed to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.

(5) Whenever an insurance contract is cancelled in accordance with this section, the insurer shall promptly return whatever gross unearned premiums are due under the contract to the insurance premium finance company effecting the cancellation for the benefit of the insured or insureds. Whenever the return premium is in excess of the amount due the insurance premium finance company by the insured under the agreement, such excess shall be remitted promptly to the order of the insured, subject to the minimum service charge provided for in this article.

(1967, c. 825; 1969, c. 941.)

Editor's Note. — The 1967 amendment struck out "and agent" preceding "subject" near the end of the last sentence in subdivision (5).

The 1969 amendment substituted "mailed to the last known address of" for "furnished" in the first sentence of subdivision (1).

As the rest of the section was not af-

ected by the amendments, it is not set out.

Authority to Cancel Policy and Collect Unearned Premium Is Security.—The authority given by a borrower to an insurance premium finance company to cancel the policy and collect the unearned premium upon the borrower's default, is security analogous to a chattel mortgage or a

conditional sale. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

The burden is upon the insurance company to show that all statutory requirements have been complied with, including the ten days' written notice by the premium finance company to the insured together with said notice to the insurance agent, prior to the premium finance company requesting cancellation of the policy. *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968).

The burden of proving cancellation by the insured or his agent is on the insurance company. *Ingram v. Nationwide Mut. Ins. Co.*, 5 N.C. App. 255, 168 S.E.2d 224 (1969).

To avoid liability to a third-party beneficiary of an assigned risk automobile in-

urance policy, the insurer must allege and prove cancellation and termination of the policy in accordance with the applicable statutes. *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Redress of Insurance Company Where Finance Company Wrongfully Requests Cancellation.—If the premium finance company misleads the insurance company wrongfully by requesting cancellation of the policy, the insurance company can seek redress from the premium finance company. *Ingram v. Nationwide Mut. Ins. Co.*, 5 N.C. App. 255, 168 S.E.2d 224 (1969).

Stated in *Hayes v. Hartford Accident & Indem. Co.*, 274 N.C. 73, 161 S.E.2d 552 (1968).

§ 58-61. Violations; penalties.—Any person who shall engage in the business referred to in this article without first receiving a license, or who shall fail to secure a renewal of his license upon the expiration of the license year, or shall engage in the business herein referred to after the license has been suspended or revoked as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall willfully and knowingly enter false information on an insurance premium finance agreement, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this article, shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), or be imprisoned, or both, at the discretion of the court. (1963, c. 1118; 1965, c. 1040.)

Editor's Note. — The 1965 amendment inserted "or who shall willfully and knowingly enter false information on an insur-

ance premium finance agreement" near the middle of this section.

§ 58-61.1. Disposition of fees.

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 4A.

Insurance Business Through Credit Cards Prohibited.

§ 58-61.2. Solicitation, negotiation or payment of premiums on insurance policies through credit card facilities prohibited; exceptions.—Except as otherwise provided herein, no authorized insurer and no representative of such insurer or insurance broker shall employ or avail itself of the facilities of any person, firm or corporation engaged in the credit card business to solicit or negotiate any contract of insurance upon any life or risk within the State of North Carolina, or accept the payment of premiums upon a policy of insurance, insuring any life or risk in the State of North Carolina, through the use of any credit card facility. Except as otherwise provided herein, no person, firm or corporation engaged in the business of extending credit through a credit card system shall, on behalf of any insurer, its representative of any insurance broker, utilize his or its credit card facilities to solicit for, negotiate contracts of insurance or accept the payment of premiums upon any contract of insurance from credit card holders or prospective credit card holders who reside in this State. The solicitation for and the negotiation of policies of insurance prohibited by this section shall include, but shall not be limited to, the transmittal of applications for insurance, premium rate

schedules, circulars, letters or sales literature pertaining to insurance to credit card holders or prospective credit card holders who reside in this State. Credit card business as used in this section shall mean the business of extending credit to persons who are holders of credit cards issued by the credit card facility or organization entitling the holder to pay charges for purchases or other transactions through the use of credit card facilities.

Nothing in this article shall prohibit an authorized insurer, the representative of such insurer, or an insurance broker from accepting payment of an insurance premium through a credit card facility provided and operated by a banking corporation principally domiciled in this State and doing business under the laws of the State of North Carolina or the United States. No such bank shall be prohibited from making such credit card facility available for this limited purpose, provided, that all records relating to the payment of insurance premiums through such credit card facility are maintained within the State of North Carolina.

Nothing in this article shall prohibit an authorized insurer, the representative of such insurer, or an insurance broker from notifying its or his customers or prospective customers through means other than credit card facilities of the availability of credit card facilities for the payment of insurance premiums. (1967, c. 1245.)

ARTICLE 5.

License Fees and Taxes.

§ 58-62. Commissioner to report and pay monthly.

Payment of Penalty Imposed by § 58-44.6.—By clear implication of this section and § 58-63, the amount of any monetary civil penalty imposed and collected as au-

thorized by § 58-44.6 should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-63. Schedule of fees and charges.

Payment of Penalty Imposed by § 58-44.6.—By clear implication of this section and § 58-62, the amount of any monetary civil penalty imposed and collected as au-

thorized by § 58-44.6 should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 6.

General Domestic Companies.

§ 58-72. Kinds of insurance authorized.—The kinds of insurance which may be authorized in this State, subject to the other provisions of this Chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this Chapter, any insurer authorized to do business in this State may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this State. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein:

- (2) "Annuities," meaning all agreements to make periodical payments, whether in fixed or variable dollar amounts, or both, where the mak-

ing or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of subdivision (1).

- (17) "Credit insurance," meaning indemnifying merchants or other persons extending credit against loss or damage resulting from the nonpayment of debts owed to them; and including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to such insurer or to any person so insured by him including without limiting the foregoing, mortgage guaranty insurance which is insurance against financial loss by reason of the nonpayment of principal, interest and other sums agreed to be paid under the terms of any note or bond, or other evidence of indebtedness secured by a security interest, mortgage deed of trust, or other instrument constituting a lien or charge on real estate, or on such personal property as the Commissioner may from time to time approve.

(1967, c. 624, s. 1; 1969, c. 616, s. 1.)

Editor's Note.—

The 1967 amendment added at the end of subdivision (17) the provision as to mortgage guaranty insurance.

The 1969 amendment, effective July 1, 1970, inserted "whether in fixed or variable

dollar amounts, or both" near the beginning of subdivision (2).

As the rest of the section was not changed by the amendments, only subdivisions (2) and (17) are set out.

§ 58-77. Amount of capital and/or surplus required; impairment of capital or surplus.—The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of this Chapter shall be as follows:

(1) Stock Life Insurance Companies.

- a. A stock corporation may be organized in the manner prescribed in this chapter and licensed to do the business of life insurance, only when it shall have paid-in capital of at least three hundred thousand dollars (\$300,000.00) and a paid-in initial surplus of an amount at least equal to such capital, and it may in addition do the kind of business specified in subdivision (2) of G.S. 58-72, without having additional capital or surplus. Every such company shall at all times thereafter maintain a minimum capital of not less than three hundred thousand dollars (\$300,000.00) and a minimum surplus of at least seventy-five thousand dollars (\$75,000.00). Provided that, any such corporation may do either or both of the kinds of insurance authorized for stock, accident and health insurance companies, as set out in paragraphs a and b of subdivision (3) of G.S. 58-72 where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in subdivision (2) hereof as applicable and maintains the same as required therein.
- b. If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do the business of life insurance, or the writing of annuities or both, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit the organization of a stock corporation to do on such restricted plan either or both of the kinds of business specified in subdivisions (1) and (2) of G.S. 58-72, with the minimum paid-in capital and a minimum paid-in surplus in an amount to be prescribed by him, but in no event to be less than a paid-in capital of two hundred thousand dollars (\$200,000.00)

and a paid-in surplus of two hundred thousand dollars (\$200,000.00). Every such company shall at all times thereafter maintain such prescribed minimum capital and a minimum surplus of at least fifty thousand dollars (\$50,000.00.)

- (9) Any domestic, foreign or alien company licensed to do business in North Carolina prior to July 1, 1965, shall be permitted to continue to do the same kinds of business which it was authorized to do on such date without being required to increase its capital and/or surplus, provided, however, such insurers shall increase the capital and surplus requirements to the amounts set forth herein on or before July 1, 1975, but the requirements of this section as to capital and surplus shall apply to such companies as a prerequisite to writing additional lines of business.

(1965, c. 947; 1967, c. 300; 1971, c. 536; 1973, c. 686.)

Editor's Note.—

The 1965 amendment substituted "the kind of business specified in subdivision (2) of G.S. 58-72" for "any one or more of the kinds of business specified in subdivisions (2) and (3) of G.S. 58-72" near the end of the first sentence of paragraph a of subdivision (1), added the last sentence of that paragraph, and substituted "July 1, 1965" for "July 1, 1963" near the beginning of subdivision (9).

The 1967 amendment substituted "July

1, 1971" for "July 1, 1969" in subdivision (9).

The 1971 amendment substituted "July 1, 1973" for "July 1, 1971" in subdivision (9).

The 1973 amendment substituted "July 1, 1975," for "July 1, 1973," in subdivision (9).

As the rest of the section was not changed by the amendments, only the opening paragraph and subdivisions (1) and (9) are set out.

§ 58-79. Investments; life.—(a) Investments Specified.—Every domestic stock and mutual life insurance company must have and continually keep to the extent of an amount equal to its entire reserves, as hereinafter defined, and entire capital, if any, and minimum required surplus, invested in:

- (1) Coin or currency of the United States of America, on hand or on deposit in a national or state bank or trust company or invested in the shares of any building and loan or savings and loan association, or invested in the shares of any federal savings and loan association.
- (2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations of the United States of America or of the Dominion of Canada or other interest-bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by the Dominion of Canada.
- (3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of the Dominion of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America.
- (4) Interest-bearing bonds of any commission, authority or political subdivision having legal authority to issue the same of any state, District of Columbia, territory or possession of the United States of America or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America.
- (5) Federal farm loan bonds issued by federal land banks organized under the provisions of the act of Congress known as the Federal Farm Loan Act. Any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. Interest-bearing bonds, notes or other interest-bearing obligations of any solvent corporation organized under the laws

of the United States of America or of the Dominion of Canada, or under the laws of any state, District of Columbia, territory or possession of the United States of America, or obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development Bank, Asian Development Bank and Inter-American Development Bank. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation equipment wholly or in part within the United States of America and a right to receive determined portions of rental, purchases or other fixed obligatory payments for the use or purchase of such transportation equipment.

- (6) Dividend paying stocks or shares of any corporation created or existing under the laws of the United States of America or of any state, District of Columbia, territory or possession of the United States of America; notwithstanding any provisions in this section to the contrary no company may invest more than ten percent (10%) of its total admitted assets in common stocks; and further provided, that no company may invest more than three percent (3%) of its admitted assets in the stock or shares of any one corporation, and provided further, except as the Commissioner shall permit, that such investment in any one corporation not engaged solely in the business of insurance shall not result in the acquisition of more than twenty percent (20%) of the outstanding voting stock or shares of such corporation. The restrictions in this section do not apply to shares of building and loan or savings and loan associations or federal savings and loan associations.
- (7) Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple or improved leasehold real estate in the District of Columbia or in any state, territory or possession of the United States of America, to an amount not exceeding seventy-five percent (75%) of the fair market value of such fee simple or improved leasehold real estate. No loan may be made on leasehold real estate unless the lease has at least 30 years to run before its termination and the loan matures at least 20 years before expiration of the lease. Whenever such loans are made upon fee simple, or improved leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire, and the fire insurance policies shall contain a standard mortgage clause and shall be delivered to the mortgagee as additional security for the said loan.

Loans secured by first mortgages which the Federal Housing Administrator has insured or has made a commitment to insure, or invested in mortgage notes or bonds so insured, and neither the limitations of this section nor any other law of this State requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured mortgage loans.

Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple real estate in connection with which the Veterans Administration of the United States has guaranteed, or has made a commitment to guarantee, a portion of the loan pursuant to the Servicemen's Readjustment Act of 1944, and amendments thereto, provided the amount of any such loan, less the portion thereof guaranteed by said Veterans Administration, shall not exceed seventy-five percent (75%) of the fair market value of such real estate.

In all investments made upon mortgages, the evidence of the debt, if any, shall accompany the mortgage or deed of trust.

- (8) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premiums paid, if any, shall be amortized over the

period between date of acquisition and earliest redemption date or charged off at any time prior to redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

- (9) Collateral loans secured by pledge of any security named in subdivisions (1), (2), (3), (4), (5), (6), (7) and (8) of this subsection; provided that the current market value of such pledged securities shall be at all times during the continuance of such loans at least twenty-five percent (25%) more than the unpaid balance of the amount loaned on them.
- (10) Loans upon the policies of the company; provided that the total indebtedness against any policy shall not be greater than the loan value of such policy.
- (11) No domestic company may directly or indirectly acquire or hold real property except as follows:
 - a. Such land and buildings thereon in which it has its principal office and such real estate as shall be requisite for the convenient transaction of its own business; the amount invested in such real property shall not exceed ten per centum (10%) of the investing company's admitted assets, but the Commissioner may grant permission to the company to invest in real property for such purpose in such increased amount as he may deem proper upon a hearing held before him.
 - b. Property mortgaged to it in good faith as security for loans previously contracted for money due.
 - c. Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.
 - d. Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it under paragraphs b and c of this subdivision and subject to the prior written approval of the Commissioner.
 - e.
 1. Real estate acquired for the purpose of leasing the same to any person, firm, or corporation, or real estate already leased under the following conditions:
 - I.
 - A. Where there has already been erected on said property a building or other improvements satisfactory to the purchaser, or
 - B. Where the lessee shall at its own cost erect thereon, free of liens, a building or other improvements satisfactory to the lessor, or
 - C. Where the lessor under the terms and conditions of a lease executed and entered into simultaneously with the purchase of the property agrees to erect a building or other improvements on said property;
 - II. That the said improvements shall remain on the said property during the period of the lease, and in cases where the said improvements are put

upon said property at the cost of the lessee the said improvements at the termination of the lease shall vest, free of liens, in the owner of the real estate;

- III. That during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subparagraph (a) (11) e 1 shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subparagraph, nor shall real estate acquired pursuant to this subparagraph (a) (11) e 1 be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by at least two percent (2%) of the investment allocable to the improvements on such real estate. The total investments of any company under this subparagraph (a) (11) e 1 shall not exceed six percent (6%) of its assets, nor more than fifty percent (50%) of its capital and surplus whichever is less.
2. Subject to approval of the Commissioner, real estate for recreation, hospitalization, convalescent and retirement purposes of its employees. Such investment under this subparagraph (a) (11) e 2 shall not exceed five percent (5%) of the company's surplus.
 3. Subject to the approval of the Commissioner, real estate for public or private housing developments. Such investment under this subparagraph (a) (11) e 3 shall be subject to and not exceed the limitation provided for in the last sentence of subparagraph (a) (11) e 1 III hereof.
 4. No investment shall be made by any company pursuant to this paragraph e which will cause such company's investment in all real property owned or held by it directly or indirectly to exceed ten percent (10%) of its assets.
- f. It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose. Real estate acquired under paragraph (a) (11) a and subparagraph (a) (11) e 2 of this section which has ceased to be used or to be necessary for the purposes stated therein shall be sold within five years thereafter, unless the company procures a certificate from the Commissioner that the interest of the company will materially suffer by a forced sale of such real estate in which event the time for the sale may be extended to such a time as the Commissioner may direct in the certificate. Any real estate acquired under paragraphs b, c, and d of this subdivision (11) shall be sold within five years after the company has acquired title thereto; provided, that the Commissioner may in his discretion extend the five-year period as provided hereinabove. Any real estate acquired under subparagraph (a) (11) e 1 of this section shall within five years after the termination or expiration of such lease be sold or released for an additional term pursuant to the provisions of subparagraph (a) (11) e 1;

provided, that the Commissioner may in his discretion extend the five-year period as provided hereinabove. Nothing contained herein prevents any insurance company from improving or conveying its real estate, notwithstanding the lapse of five years without having procured such certificate from the Commissioner.

- (12) Electronic and mechanical machines constituting a data processing and accounting system if the cost of such system is at least twenty-five thousand dollars (\$25,000), but not more than two percent (2%) of its admitted assets, which cost shall be amortized in full over a period not to exceed 10 calendar years.
- (13) Interest, rents or other fixed income due and accrued on any of the investments named in subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (10) and (11) of this subsection pursuant to regulations promulgated by the Commissioner.
- (14) Notwithstanding any expressed or implied prohibitions, a company may, after the date of the enactment of this subdivision, invest in investments which do not otherwise qualify under any other provision of this subsection; provided, however, that the investments authorized by this subdivision shall not exceed the lesser of (i) five percent (5%) of its admitted assets or (ii) the amount by which total admitted assets exceed total liabilities (except capital) plus six hundred thousand dollars (\$600,000) as shown on its last annual statement preceding the date of the acquisition of such investment as filed with the Commissioner of Insurance.
- (15) To the extent necessary to satisfy the investment requirements as to reserves and entire capital, if any, and minimum required surplus, no company shall make any investment in or loan on any of the securities mentioned in this section, which are in default as to principal or interest or as to which the dividend on the last preceding dividend date has been passed.

(1967, c. 842; 1969, c. 1199; 1971, c. 386, s. 1; 1973, c. 239, s. 5.)

Editor's Note.—

The 1967 amendment inserted "common" before "stocks" near the middle of subdivision (6), substituted, at the end of the second sentence of subparagraph (11) e 1 III, "by at least two percent (2%) of the investment allocable to the improvements on such real estate" for "by equal decrements sufficient to write off at least seventy-five percent (75%) of the investment at the normal termination of the lease or at the end of thirty years should the term of the lease be for a longer period," inserted present subdivision (14) and renumbered former subdivision (14) as (15), all in subsection (a).

The 1969 amendment deleted the former second paragraph of subdivision (14) of

subsection (a), relating to investment in real property.

The 1971 amendment added "Asian Development Bank and Inter-American Development Bank" at the end of the second sentence in subsection (a)(5).

The 1973 amendment inserted in subdivision (5) of subsection (a) the provisions as to obligations issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

As the rest of the section was not changed by the amendments, only subsection (a) is set out.

Cited in *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-79.1. Investments; fire, casualty and miscellaneous.—(a) **Minimum Capital Investments.**—Before investing any of its funds in any other classes of securities or types of investments, every domestic stock insurance company other than a life insurance company or a fraternal benefit association, shall to the extent of an amount equal in value to the minimum capital required by law for a domestic stock corporation authorized to transact the same kinds of insurance, invest its funds only in securities of the classes described in this section and which are not

in default as to principal or interest. Every domestic mutual insurance company, other than a life insurance company, before investing any of its funds in any other classes of securities or types of investment, shall invest its funds only in such securities to the extent of an amount equal in value to the minimum assets or surplus required of such company by the laws of North Carolina. Investments equal in value to such an amount and of the kind or kinds hereinafter prescribed in this section shall at all times be maintained free and clear from any lien or pledge other than as impressed upon a deposit with any government within the United States or upon trustee assets held in trust for the security of all its policyholders and creditors. Minimum capital investments of such an insurer shall consist of the following classes of securities and not less than sixty percent (60%) of the total amount of the required minimum capital investments shall consist of the classes specified in subdivisions (1) and (2) following:

- (1) Bonds, or other evidences of indebtedness of the United States of America or of any of its agencies when such obligations are guaranteed as to principal and interest by the United States of America.
- (2) Bonds, or stocks or other evidences of indebtedness which are direct obligations of the State of North Carolina or of any county, district or municipality thereof.
- (3) Bonds, or other evidences of indebtedness which are direct obligations of any state of the United States.
- (4) Mortgage loans or deeds of trust as specified in paragraphs a or c of subdivision (6) of subsection (c) on property located in this State.
- (5) Ground rents as specified in subdivision (7) of subsection (c).
- (6) Obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development, Asian Development Bank and Inter-American Development Bank.

(c) Classes of Reserve Investments.—The reserve investments of every domestic stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, shall consist of the following:

- (1) Bonds or other evidences of indebtedness, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States of America or by any state thereof or by any territory or possession of the United States or by the District of Columbia, or by any county, city, town, village, municipality or district therein or by any political subdivision thereof or by any civil division or public instrumentality of one or more of the foregoing, if by statutory or other legal requirements applicable thereto, such obligations are payable, as to both principal and interest, from taxes levied or by such law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements.
- (2) Obligations, other than those eligible for investment under subdivision (6), issued, assumed, or guaranteed by any solvent institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest and which are qualified under any of the following paragraphs:
 - a. Obligations which are secured by adequate collateral security and bear fixed interest and if during each of any three, including the last two, of the five fiscal years next preceding the date of acquisition by such insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its

fixed charges, as hereinafter defined, shall have been not less than one and one-quarter times the total of its fixed charges for such year, or obligations which, at the date of acquisition by such insurer, are adequately secured and have investment qualities and characteristics wherein the speculative elements are not predominant. In determining the adequacy of collateral security, not more than one third of the total value of such required collateral shall consist of stock other than stock meeting the requirements of subsection (c).

- b. Fixed interest-bearing obligations, other than those described in paragraph a if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during the last year of such period such net earnings shall have been not less than one and one-half times its fixed charges for such year.
- c. Adjustment, income or other contingent interest obligations if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

Within the meaning of this section the term "obligation" shall include bonds, debentures, notes or other evidences of indebtedness; the term "institution" shall include a corporation, a joint stock association and a business trust. The term "net earnings available for fixed charges" shall mean net income after deducting operating and maintenance expenses, taxes other than federal and State income taxes, depreciation and depletion, but excluding extraordinary non-recurring items of income or expense appearing in the regular financial statements of the issuing, assuming or guaranteeing institutions. The term "fixed charges" shall include interest on funded and unfunded debt amortization of debt discount, and rentals for leased properties. If net earnings are determined in reliance upon consolidated earnings statements of parent and subsidiary institutions, such net earnings shall be determined after provision for income taxes of subsidiaries and after proper allowance for minority stock interest, if any; and the required coverage of fixed charges shall be computed on a basis including fixed charges and preferred dividends of subsidiaries other than those payable by such subsidiaries to the parent corporation or to any other of such subsidiaries, except that if the minority common stock interest in the subsidiary corporation is substantial, the fixed charges and preferred dividends may be apportioned in accordance with regulations prescribed by the Commissioner.

In applying the earnings tests under this section to any issuing, assuming or guaranteeing institution, whether or not in legal existence during the whole of such five years next preceding the date of investment by such insurer, which has at any time or times during such five-year period acquired the assets of any other institution or institutions

by purchase, merger, consolidation or otherwise, substantially as an entirety, or has been reorganized pursuant to the bankruptcy law, the earnings of such other predecessor or constituent institutions, or of the institution so reorganized, available for interest and dividends for such portion of such period as shall have preceded such acquisition, or such reorganization may be included in the earnings of such issuing, assuming or guaranteeing institution for such portion of such period as may be determined in accordance with adjusted or pro forma consolidated earnings statements covering such portion of such period and giving effect to all stocks or shares outstanding and all fixed charges existing, immediately after such acquisition, or such reorganization.

- (3) Preferred or guaranteed stocks or shares of any solvent institution, created or existing under the laws of the United States or of any state, district or territory thereof, if all of the prior obligations, and prior preferred stocks, if any, of such institution at the date of acquisition by such insurer are eligible as investments under this section; and if qualified under paragraph a or paragraph b following:

- a. Preferred stocks or shares shall be deemed qualified if both of the following requirements are met:

1. The net earnings of such institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges, if any, its average annual maximum contingent interest if any, and its average annual preferred dividend requirements applicable to such period; and

2. During each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges, contingent interest and preferred dividend requirements for such year. The term "preferred dividend requirements" shall be deemed to mean cumulative or noncumulative dividends whether paid or not.

- b. Guaranteed stocks or shares shall be deemed qualified if the assuming or guaranteeing institution meets the requirements of paragraph b of subdivision (2) of subsection (c) construed so as to include as a fixed charge the amount of guaranteed dividends of such issue or the rental covering the guarantee of such dividends.

- (4) a. Certificates, notes or other obligations issued by trustees or receivers of any institution created or existing under the laws of the United States or of any state, district or territory thereof, which, or the assets of which, are being administered under the direction of any court having jurisdiction, if such obligation is adequately secured as to principal and interest.

- b. Equipment trust obligations or certificates which are adequately secured or other adequately secured instruments evidencing an interest in transportation equipment wholly or in part within the United States and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment.

- (5) Bank and banker's acceptances and other bills of exchange of the kind

and maturities made eligible, pursuant to law, for purchase in the open market by federal reserve banks.

- (6) a. Bonds or evidences of indebtedness other than those described in subdivision (2) of subsection (c) which are secured by first mortgages or deeds of trust upon unencumbered fee simple or improved leasehold real property located in the United States. Real property shall not be deemed to be encumbered within the meaning of this section, by reason of the existence of instruments reserving mineral, oil or timber rights, rights-of-way, sewer rights, rights in walls, nor by reason of any liens for taxes or assessments not yet due, nor by reason of building restrictions or other restrictive covenants, nor when such real property is subject to lease under which rents or profits are reserved to the owner, if in any event the security for such loan is a first lien upon such real property and if there is no condition or right of reentry or forfeiture, under which such lien can be cut off, subordinated or otherwise disturbed. No such mortgage loan or loans made or acquired by any insurer on any one property shall, at the time of investment by the insurer, exceed two thirds of the value of the real property securing the same. No such mortgage loan or loans shall be made or acquired by an insurer except after an appraisal made by an appraiser for the purpose of such investment. No such mortgage loan made or acquired by an insurer which is a participation or a part of a series or issue secured by the same mortgage or deed of trust shall be a lawful investment under this paragraph unless the entire series or issue which is secured by the same mortgage or deed of trust is held by such insurer or unless the insurer holds a senior participation in such mortgage or deed of trust giving it substantially the rights of a first mortgagee. Except as otherwise provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, shall invest in or loan upon the security of any one property more than twenty-five thousand dollars or more than two per centum of its total admitted assets, whichever is the greater. In no event shall the total investments of any such insurer in the kinds permitted under this subdivision exceed forty per centum of its total admitted assets.
- b. Purchase money mortgages or like securities received by it upon the sale or exchange of real property acquired pursuant to subdivision (8) of this subsection (c).
- c. Bonds or notes secured by mortgage or trust deed guaranteed or insured by the Federal Housing Administration under the terms of an act of Congress of the United States of June twenty-seventh, nineteen hundred thirty-four, entitled the "National Housing Act," as heretofore or hereafter amended.
- (7) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premium paid, if any, shall be amortized over the period between date of acquisition and redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(8) Real estate only if acquired or used for the following purposes in the following manner:

- a. The land and the building thereon in which it has its principal office or offices.
- b. Such as shall be requisite for its convenient accommodation in the transaction of its business.
- c. Such as shall have been acquired in satisfaction of loans, mortgages, liens, judgments, decrees or other debts previously owing to such insurer in the course of its business or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance.
- d. Such as shall have been acquired in part payment of the consideration on the sale of real property owned by it, if each such transaction shall have effected a net reduction in the company's investment in real property.
- e. Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it pursuant to the provisions of paragraph c or d of this subdivision (8).

All real property acquired pursuant to paragraphs a and b of this subdivision shall be disposed of within five years after it shall have ceased to be necessary for the convenient accommodation of such insurer in the transaction of its business, and all real property acquired pursuant to paragraphs c, d and e of this subdivision shall be disposed of within five years after the date of acquisition, unless in either case the Commissioner shall certify that the interests of the insurer will suffer materially by the forced sale thereof, in which event the time for disposal of such real property may be extended for such time as the Commissioner shall prescribe in such certificate. No real property shall be acquired by any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, pursuant to paragraphs a, b, d or e of this subdivision (8), except with the approval of the Commissioner.

- (9) a. Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, may invest in, or otherwise acquire or loan upon, bonds, notes or other evidences of indebtedness which are valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof and which are not in default as to principal or interest; but the aggregate amount of such investments which are held at any time by any such insurer, together with all Canadian investments held by it pursuant to the following paragraph b shall not exceed ten percent of its total admitted assets, except where a greater amount is permitted pursuant to the following paragraph b, in which case the provisions of this subdivision shall not be applicable.
- b. Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, which is authorized to do business in a foreign country or possession of the United States or which has outstanding insurance or reinsurance contracts on risks located in a foreign country or possession of the United States, may invest in, or otherwise acquire or loan upon securities and investments in such foreign country or possession which are substantially of the same

kinds, classes and investment grades as those eligible for investment under the foregoing subdivisions of this subsection; but the aggregate amount of such investments in a foreign country or a possession of the United States and of cash in the currency of such country or possession which is at any time held by such insurer shall not, except as provided in the next preceding paragraph a, exceed one and one-half times the amount of its reserves and other obligations under such contracts or the amount which such insurer is required by law to invest in such country or possession, whichever shall be greater.

- (10) Stock and debentures, or either, of any housing company organized under the public housing law of this State, to the extent and upon such conditions as may be authorized by the Commissioner, provided all of the stock of such housing company has been or is to be originally issued to one or more insurance companies.

(e) Limitation of Investments.—Except as more specifically provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, shall have more than ten percent of its total admitted assets invested in, or loaned upon the securities of any one institution; but this restriction shall not apply to the classes of governmental obligations (including those eligible under paragraph c, subdivision (6) of subsection (c)) eligible for minimum capital investments of such insurer nor to investments in stocks of other insurance companies. No domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association shall hereafter acquire any real property of the kind or kinds specified in paragraphs a and b of subdivision (8) of subsection (c), if the value of such real property, together with the value of all such real property then held by it, exceeds ten per centum of its total admitted assets except as more specifically provided in this section.

(h) Valuation of Investments.

- (1) The investments of every stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, except securities subject to amortization and except as otherwise provided in this section, shall be valued, in the discretion of the Commissioner, at their market value, or at their appraised value, or at prices determined by him as representing their fair market value. If the Commissioner finds that in view of the character of investments of any such insurer authorized to do business in this State it would be prudent for such insurer to establish a special reserve for possible losses or fluctuations in the values of its investments, he may require such insurer to establish such reserve, reasonable in amount, and may require that such reserve be maintained and reported in any statement or report of the financial condition of such insurer. The Commissioner may, in connection with any examination or required financial statement of an authorized insurer require such insurer to furnish him a complete financial statement and audited report of the financial condition of any corporation of which the securities are owned wholly or partly by such insurer and may cause an examination to be made of any subsidiary or affiliate of such insurer.
- (2) The stock of an insurance company shall be valued at its book value as shown by its last annual statement or the last report on examination, whichever is more recent. The book value of a share of common stock of an insurance company shall be ascertained by dividing (i) the amount of its capital and surplus less the value of all of its preferred stock, if any, outstanding, by (ii) the number of shares of its

common stock issued and outstanding. Notwithstanding the foregoing provisions, an insurer may, at its option, value its holdings of stock in a subsidiary insurance company in an amount not less than acquisition cost if such acquisition cost is less than the value determined as hereinbefore provided.

- (3) Real estate acquired by foreclosure or by deed in lieu thereof, or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance, in the absence of a recent appraisal deemed by the Commissioner to be reliable, shall not be valued at an amount greater than the unpaid principal of the defaulted loan at the date of such foreclosure or deed, together with any taxes and expenses paid or incurred by such insurer at such time in connection with such acquisition (but not including any uncollected interest on such loan); and the cost of additions or improvements thereafter made by such insurer and any amount or amounts thereafter paid by such insurer on any assessments levied for improvements in connection with the property; provided, that the value of any property conveyed to any mortgage guaranty insurance company in satisfaction of debts or guarantees previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees or mortgages obtained or made for such debts or guaranties, or acquired upon tender of the named insured, whether such property be held by it directly or indirectly, together with the value of all such real property then held by it shall not exceed thirty percent (30%) of its total admitted assets; provided, however, that the Commissioner of Insurance shall have authority from time to time by regulation to fix a lesser percentage of admitted assets than provided by this statute, and when so fixed, the property so held by such company, directly or indirectly, shall not exceed such percentage of its admitted assets.
- (4) Purchase money mortgages shall be valued in an amount not exceeding the acquisition cost of such real property or ninety percent of the value of such real property, whichever is less.
- (5) The stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute lawful investments for the insurer if acquired or held directly by the insurer.

1967, c. 624, ss. 2-4; 1971, c. 386, s. 2.)

Editor's Note.—

The 1967 amendment added, at the end of paragraph c of subdivision (8) of subsection (c), "or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance," added, at the end of subsection (e), "except as more specifically provided in this section," inserted, near the beginning of subdivision (3) of subsection (h), "or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance" and added the proviso at the end of subdivision (3) of subsection (h).

The 1971 amendment added "Asian Development Bank and Inter-American Development Bank" at the end of subsection (a) (6).

Only the subsections affected by the amendments are set out.

Investment in the common stock of a subsidiary represents the ownership of real property. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Investment in Wholly Owned Subsidiary Not Admitted Asset.—Where the petitioner's investment in the wholly owned subsidiary would enable the petitioner to convert unadmitted assets into admitted assets, and in so doing evade the real property limitation provided by the law for appellant insurance company, under these circumstances it would not be in the public interest to consider the company's investment in its wholly owned subsidiary as an admitted asset. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Reserve Investment Can Consist of Real Estate.—Subsection (c)(8) provides that a company's reserve investment can consist of real estate but only if used for the company's principal office or for its convenient accommodation in the transaction of its business. In re Hardware Mut. Ins Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Subsection (d)(4) allows a company to invest in the stock of its wholly owned subsidiary subject to the provisions of subsection (c). In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Value of Property May Not Exceed 10% of Admitted Assets. — Under subsection (e), a company cannot even acquire real property for the purposes stated in subsection (c)(8) a and b if the value of the acquired property, together with all the real property held by the company, exceeds 10% of its total admitted assets. In re Hardware Mut. Ins. Co. 278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-79.2. Establishment of separate accounts by life insurance companies.—(a) When used in this section, "variable contract" shall mean any individual or group contract issued by an insurance company providing for life insurance or annuity benefits or contractual payments or values which vary so as to reflect investment results of any segregated portfolio of investments or of a designated separate account or accounts in which amounts received or retained in connection with any of such contracts have been placed.

(b) Any domestic life insurance company may, pursuant to resolution of its board of directors, establish one or more separate accounts and may allocate to such account or accounts amounts received or retained in connection with variable contracts (including without limitation proceeds applied under optional modes of settlement or under dividend options) to provide for life insurance or annuities (and benefits incidental thereto) payable in fixed or variable amounts or both.

(c) In addition to the amounts allocated under subsection (b), such company may allocate from its general accounts to such separate account or accounts additional amounts, which may include an initial allocation to establish such account; provided, that the aggregate amount so allocated shall not exceed one per centum of its admitted assets as of the preceding December 31, or one million dollars (\$1,000,000), whichever is less, and, provided further, that such company shall be entitled to withdraw at any time, in whole or in part, its participation in any separate account to which funds have been allocated as provided in this subsection (c), and to receive, upon withdrawal, its proportionate share of the value of the assets of the separate account at the time of withdrawal.

(d) Except as hereinafter provided, the amounts allocated to any separate account and accumulations thereon may be invested and reinvested without regard to any requirements or limitations prescribed by the laws of this State governing the investments of life insurance companies; provided, that to the extent that the company's reserve liability with regard to (i) benefits guaranteed as to amount and duration, and (ii) funds guaranteed as to principal amount or stated rate of interest is maintained in any separate account, a portion of the assets of such separate account at least equal to such reserve liability shall be, except as the Commissioner may otherwise approve, invested in accordance with the laws of this State governing the investments of life insurance companies. The investments in such separate account or accounts shall not be taken into account in applying the investment limitations applicable to other investments of the company.

(e) With respect to seventy-five percent (75%) of the market value of the total assets in a separate account no company shall purchase or otherwise acquire the securities of any issuer, other than securities issued or guaranteed as to principal or interest by the United States, if immediately after such purchase or acquisition the market value of such investment, together with prior investments of such separate account in such security taken at market, would exceed ten percent (10%) of the market value of the assets of said separate account; provided, however, that the Commissioner may waive such limitation if, in his opinion, such

waiver will not render the operation of such separate account hazardous to the public or the policyholders in this State.

(f) Unless otherwise permitted by law or approved by the Commissioner, no company shall purchase or otherwise acquire for its separate accounts the voting securities of any issuer if as a result of such acquisition the insurance company and its separate accounts, in the aggregate, will own in excess of ten percent (10%) of the total issued and outstanding voting securities of such issuer provided that the foregoing shall not apply with respect to securities held in separate accounts, the voting rights in which are exercisable only in accordance with instructions from persons having interests in such accounts.

(g) The limitations provided in subsections (e) and (f) above shall not apply to the investment with respect to a separate account in the securities of an investment company registered under the Investment Company Act of 1940, provided that the investments of such investment company comply in substance with subsections (e) and (f) hereof.

(h) The income, if any, and gains and losses, realized or unrealized, from assets allocated to each account shall be credited to or charged against the account without regard to other income, gains or losses of the company.

(i) Unless otherwise approved by the Commissioner, assets allocated to a separate account shall be valued at their market value on the date of valuation, or if there is no readily available market, then as provided under the terms of the contract or the rules or other written agreement applicable to such separate account; provided, that unless otherwise approved by the Commissioner that portion of the assets of such separate account equal to the company's reserve liability with regard to the guaranteed benefits and funds referred to in subsection (d) hereof, if any, shall be valued in accordance with the rules otherwise applicable to the company's assets. The reserve liability for variable contracts shall be determined in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees.

(j) If and to the extent so provided under the applicable contracts, that portion of the assets of any such separate account equal to the reserves and other contract liabilities with respect to such account shall not be chargeable with liabilities arising out of any other business the company may conduct.

(k) The life insurance company shall have the power and the company's charter shall be deemed amended to authorize such company to do all things necessary under any applicable state or federal law in order that variable contracts may be lawfully sold or offered for sale. To the extent such company deems it necessary to comply with any applicable federal or state laws, such company, with respect to any separate account, including without limitation any separate account which is a management investment company or a unit investment trust, may provide, for persons having an interest therein, appropriate voting and other rights and special procedures for the conduct of the business of such account, including without limitation special rights and procedures relating to investment policy, investment advisory services, selection of independent public accountants, and the selection of a committee, the members of which need not be otherwise affiliated with such company, to manage the business of such account. This provision shall not affect existing laws pertaining to the voting rights of the life insurance company's policyholders.

(l) Amounts allocated to a separate account in the exercise of the power granted by this section shall be owned by the company, and the company shall not be, or hold itself out to be, a trustee with respect to such amounts.

(m) The company shall not, in connection with the allocation of investments or expenses, or in any other respect, discriminate unfairly between separate accounts or between separate and other accounts, but this provision shall not require the company to follow uniform investment policies for its accounts.

(n) No sale, exchange or other transfer of assets may be made by a company between any of its separate accounts or between any other investment account and

one or more of its separate accounts unless, in case of a transfer into a separate account, such transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which the transfer is made, and unless such transfer, whether into or from a separate account, is made (i) by a transfer of cash, or (ii) by a transfer of securities having a readily determinable market value, provided that such transfer of securities is approved by the Commissioner. The Commissioner may approve other transfers among such accounts if, in his opinion, such transfers would not be inequitable.

(o) Any contract providing benefits payable in variable amounts delivered or issued for delivery in this State shall contain a statement of the essential features of the procedure to be followed by the company in determining the dollar amount of such variable benefits. Any such contract under which the benefits vary to reflect investment experience, including a group contract and any certificate in evidence of variable benefits issued thereunder, shall state that such dollar amount will so vary and shall contain on its first page a statement to the effect that the benefits thereunder are on a variable basis.

(p) Any variable annuity contract providing benefits payable in variable amounts issued under this section may include as an incidental benefit provision for payment on death during the deferred period of an amount not in excess of the greater of the sum of the premiums or stipulated payments paid under the contract or the value of the contract at time of death; such contracts will be deemed not to be contracts of life insurance and therefore not subject to the provisions of the insurance law governing life insurance contracts. Provision for any other benefit on death during the deferred period will be subject to such insurance provisions.

(q) No domestic life insurance company and no other life insurance company shall deliver or issue for delivery within this State any contracts under this section unless it is licensed or organized to do a life insurance or annuity business in this State, and the Commissioner of Insurance is satisfied that its financial condition and its methods of operation in connection with the issuance of such contracts will not render its operation hazardous to the public or its policyholders in this State. In determining the qualification of a company requesting authority to deliver such contracts within this State, the Commissioner of Insurance shall consider, among other things:

- (1) The history and financial condition of the company;
- (2) The character, responsibility and general fitness of the officers and directors of the company; and
- (3) The law and regulations under which the company is authorized in the state of domicile to issue variable annuity contracts. The state of entry of an alien company shall be deemed its place of domicile for this purpose.

If the company is a subsidiary of an admitted life insurance company, or affiliated with such company through common management or ownership, it may be deemed by the Commissioner to have met the provisions of this subsection if either it or the parent or affiliated company meets the requirements hereof.

(r) The Commissioner of Insurance shall have sole and exclusive authority to regulate the issuance by life insurance companies and the sale of such contracts and to issue such reasonable rules and regulations as may be necessary to carry out the purposes and provisions of this section, and such contracts and the life insurance companies which issue them shall not be subject to the Securities Law of North Carolina nor to the jurisdiction of the Secretary of State thereunder.

(s) Except for G.S. 58-207 in the case of a variable annuity contract and G.S. 58-201.2, 58-207 and 58-211(1) in the case of a variable life insurance policy and except as otherwise provided in this section, all pertinent provisions of the insurance laws of this State shall apply to separate accounts and contracts issued in

connection therewith. Any individual variable life insurance contract, delivered or issued for delivery within this State, shall contain reinstatement and nonforfeiture provisions appropriate to such a contract. Any group variable life insurance contract, delivered or issued or delivery within this State, shall contain grace provisions appropriate to such a contract. Any individual variable annuity contract, delivered or issued for delivery within this State, shall contain reinstatement provisions appropriate to such a contract. (1965, c. 166; 1969, c. 616, s. 2; 1971, c. 831, s. 2; 1973, c. 490.)

Editor's Note.—The 1969 amendment, effective July 1, 1970, rewrote this section.

The 1971 amendment deleted, at the end of subsection (r), a proviso that "any person that offers for sale or sells such contracts shall be subject to the Securities Law of North Carolina."

The 1973 amendment, effective July 1, 1973, deleted "annuity" preceding "contract" where the word first appears in subsection (a) and inserted "life insurance or" near the middle of subsection (a), deleted "annuity" preceding "contract" near the middle of subsection (b) and added all of subsection (b) beginning with the first parenthesis. The amendment substituted, at the beginning of subsection (f), the language beginning "Unless otherwise

permitted" and ending "will own" for "No separate account shall invest in the voting securities of a single issuer in an amount." The amendment also deleted "annuity" preceding "contracts" in the last sentence of subsection (i), rewrote subsection (k), inserted "under which the benefits vary to reflect investment experience" and substituted "so vary" for "will vary to reflect investment experience" in the second sentence of subsection (o). In subsection (q), the amendment added the second sentence of subdivision (3) and rewrote the last paragraph of the subsection. The amendment also added the first exception clause at the beginning of the first sentence of subsection (s) and added the second, third and fourth sentences of subsection (s).

§ 58-86.2. Restrictions on purchase and sale of equity securities of domestic companies. — (a) **Statement of Ownership of Equity Securities.** — Every person who is directly or indirectly the beneficial owner of more than ten per cent (10%) of any class of any equity security of a domestic stock insurance company or who is a director or an officer of such company, shall file in the office of the Commissioner on or before the first day of June, 1966, or within ten days after he becomes such beneficial owner, director or officer, a statement, in such form as the Commissioner may prescribe, of the amount of all equity securities of such company of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter if there has been a change in such ownership during such month, shall file in the office of the Commissioner a statement, in such form as the Commissioner may prescribe, indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) **Profit Made from Sale of Equity Security Held Less than Six Months.**— For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to such company, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such company within a period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the company, irrespective of any intention on the part of such beneficial owner, director or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the company, or by the owner of any equity security of the company in the name and in behalf of the company, if the company shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This section shall not be construed to cover any transaction where such beneficial owner was not such both at the time of

the purchase and sale, or the sale and purchase, of the equity security involved, or any transaction or transactions which the Commissioner by rules and regulations may exempt as not comprehended within the purpose of this section.

(c) **Delivery of Security Sold.** — It shall be unlawful for any such beneficial owner, director or officer, directly or indirectly, to sell any equity security of such company if the person selling the security or his principal (i) does not own the security sold, or (ii) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this section if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) **Sales by Dealers.**—The provisions of subsection (b) shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) shall not apply to any sale, of an equity security of a domestic stock insurance company not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on an exchange as defined in the Securities Exchange Act of 1934) for such security. The Commissioner may, by such rules and regulations as he deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

(e) **Arbitrage Transactions.**—The provisions of subsections (a), (b) and (c) of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commissioner may adopt in order to carry out the purposes of this section.

(f) **"Equity Security" Defined.** — The term "equity security" when used in this section means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commissioner shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as he may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(g) **Exemptions from Requirements of Section.**—The provisions of subsections (a), (b) and (c) hereof shall not apply to equity securities of a domestic stock insurance company if

- (1) Such securities shall be registered, or shall be required to be registered, pursuant to § 12 of the Securities Exchange Act of 1934, as amended, or if
- (2) Such domestic stock insurance company shall not have any class of its equity securities held of record by one hundred or more persons on the last business day of the year next preceding the year in which equity securities of the company would be subject to the provisions of subsections (a), (b) and (c) hereof except for the provisions of this subdivision (2).

(h) **Rules and Regulations of Commissioner.**—The Commissioner shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in him by subsections (a) through (g) hereof, and may for such purpose classify domestic stock insurance companies, securities, and other persons or matters within his jurisdiction. No provision of subsections (a), (b) and (c) hereof imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commissioner, notwithstanding that such rule or regulation may, after such act or omission, be

amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(i) Severability.—If any part or provision of this section or the application thereof to any person or circumstance be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this section or the application thereof to other persons or circumstances. (1965, c. 127, s. 2.)

Editor's Note.—This section became effective May 31, 1966.

ARTICLE 6A.

Exchange of Stock.

§ 58-86.3. **Exchange of securities.** — Any domestic insurance company with capital stock (hereinafter referred to as “domestic company”) may adopt a plan of exchange providing for the exchange by its shareholders of their stock in the domestic company for (i) shares of stock issued by any other domestic stock insurance company or other domestic stock corporation organized or reorganized under the laws of this State—such other corporation being hereinafter referred to as the “acquiring corporation”; (ii) other securities issued by the acquiring corporation; (iii) cash; (iv) other consideration; (v) any combination of such stock, such other securities, cash or other consideration. For the purpose of this article, a “domestic company” or “domestic stock insurance company” shall mean a business corporation or a stock insurance company, respectively, organized and existing under the laws of the State of North Carolina. (1967, c. 938.)

Editor's Note.—This article in the 1967 act contained sections numbered 58-86.2 through 58-86.8. As a section numbered 58-

86.2 already appeared in the Supplement, the sections added by the 1967 act have been renumbered 58-86.3 through 58-86.9.

§ 58-86.4. **Procedure for exchange.**—Subject to the provisions of G.S. 58-86.3, any domestic company may adopt a plan of exchange with any acquiring corporation providing for the exchange of the outstanding stock of the domestic company for shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof in the following manner:

- (1) Approval of the Boards of Directors.—The boards of directors of the domestic company and of the acquiring corporation by resolutions shall adopt a plan of exchange which shall set forth the terms and conditions of the exchange and the mode of carrying the same into effect and such other provisions with respect to the exchange as may be deemed necessary or desirable.
- (2) Approval of Commissioner of Insurance.—The domestic company and the acquiring corporation shall submit to the Commissioner of Insurance three copies of the plan of exchange certified by an officer of each as having been adopted in accordance with subdivision (1) of this section. Such copies of the plan of exchange shall be accompanied by (i) financial statements of the domestic company and the acquiring corporation for the last preceding fiscal year, (ii) pro forma financial statements of each corporation based on the assumption that the plan of exchange was effective as proposed at the end of the last preceding fiscal year of the domestic company, (iii) an estimate of expenses already incurred and of expenses expected to be incurred in connection with the proposed plan of exchange, (iv) a written statement which

sets forth for each corporation the identity of officers and directors of the domestic company and of the acquiring corporation, and (v) any other information which the Commissioner may require with respect to such plan.

No director, officer, member or subscriber of the domestic company or of the acquiring corporation, except as is expressly provided by the plan filed with the Commissioner of Insurance, shall receive any fee, commission, other compensations or valuable considerations whatever, for in any manner aiding, promoting, or assisting in the promotion of the plan of exchange.

The Commissioner of Insurance shall hold a public hearing upon the terms, conditions and provisions of the proposed plan of exchange to determine if the proposed plan of exchange is reasonable, fair and in the public interest. At such hearing the shareholders and the policyholders of the domestic company and the shareholders of the acquiring corporation and also the policyholders of the acquiring corporation, if it is an insurance company, and any other interested parties shall have the right to appear and to become parties to the proceedings.

Such hearing shall be commenced not less than 30 days after the date on which the plan of exchange is presented to the Commissioner. The hearing shall be held at such place, date and time as the Commissioner shall specify. Notice of the hearing shall be published in a newspaper of general circulation in the city or cities wherein are located the registered office of the domestic company and of the acquiring corporation once a week for two successive weeks, the last publication of such notice to be not more than two weeks prior to the hearing date. Written notice of the hearing shall be mailed at least ten days prior to the hearing by the domestic company and by the acquiring corporation to all of their respective shareholders. All expenses of publication shall be borne by the domestic company or the acquiring corporation or both, as shall be specified in the plan of exchange, and the Commissioner may charge the domestic company or the acquiring corporation, or both, with such of the costs of the hearing as he may deem reasonable.

The Commissioner shall issue a written order approving the plan of exchange as delivered to him by the domestic company and the acquiring corporation and such modification therein as the board of directors of each such corporation shall approve, if he finds (i) that the plan, including all such modification, if effected, will not tend adversely to affect the financial stability or management of the domestic company or the general capacity or intention to continue the safe and prudent transaction of the insurance business of the domestic company, or of the acquiring corporation, if it is a domestic insurance company; (ii) that the interests of the policyholders and shareholders of the domestic company, and, if the acquiring corporation is a domestic insurance company, the policyholders of the acquiring corporation are protected; (iii) that the terms and conditions of the plan of exchange and the proposed issuance and exchange are fair and reasonable; and (iv) that the plan of exchange is consistent with the law and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

Any order issued by the Commissioner hereunder shall be subject to court review in accordance with the provisions of G.S. 58-9.3.

- (3) Approval of Shareholders.—The plan of exchange as approved by the Commissioner of Insurance shall then be submitted to a vote of the shareholders of the domestic company at an annual or special meeting of the shareholders. Notice of the submission of the plan to the shareholders shall be included in the notice of such annual or special meeting. The plan shall be approved by the shareholders of the domestic company upon receiving the affirmative votes representing at least two thirds of the outstanding capital stock of the domestic company or such larger proportion as may be specified in the plan of exchange. Notwithstanding shareholder adoption of the plan of exchange and

at any time prior to the filing of the certificate setting forth the plan of exchange pursuant to G.S. 58-86.5, the plan of exchange may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of exchange.

- (4) **Objection.**—Any shareholder of the domestic company may, by following the procedure set forth in G.S. 55-113 (b) object to the plan of exchange and become entitled, if the plan becomes effective, to be paid by the domestic company or the acquiring corporation the fair value of his shares in the domestic company. Such payment and the amount thereof shall be determined in accordance with the provisions of G.S. 55-113 (d), (e), (f), (g) and (h). (1967, c. 938.)

Editor's Note. — By virtue of Session "Insurance Commissioner" in the catchline of Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the catchline of subdivision (2).

§ 58-86.5. **Filing plan of exchange.**—Not earlier than 31 days after the date of the meeting of shareholders of the domestic company at which the plan of exchange was approved by such shareholders, a certificate setting forth (i) the plan of exchange and (ii) the vote by which such plan was adopted by the shareholders of the domestic company, or (iii) that the plan of exchange has been abandoned, shall be signed on behalf of the domestic company by its president or a vice-president and also by its secretary or an assistant secretary and shall then be presented in triplicate to the Commissioner of Insurance. If the certificate indicates that the plan of exchange has been approved by the domestic company's shareholders as required by G.S. 58-86.4 (3) and that the facts otherwise conform to the law, he shall endorse his approval on the certificate and the same shall then be filed as provided in G.S. 55-4. Upon the filing of such certificate, the plan of exchange and the issuance and exchange provided for therein shall become effective, unless a later date and time is specified in the plan of exchange, in which event the plan of exchange and issuance and exchange provided for therein shall become effective upon such later date and time. (1967, c. 938.)

§ 58-86.6. **Effect of exchange.**—Upon the plan of exchange becoming effective, the exchange provided for therein shall be deemed to have been consummated, each shareholder of the domestic company shall cease to be a shareholder of such company and the ownership of all shares of the issued and outstanding stock of the domestic company shall vest in the acquiring corporation automatically without any physical transfer or deposit of certificates representing such shares.

Certificates representing shares of the domestic company prior to the plan of exchange becoming effective shall, after the plan of exchange becomes effective, represent (i) shares of the issued and outstanding capital stock or other securities issued by the acquiring corporation, and (ii) the right, if any, to receive such cash or other consideration upon such terms as shall be specified in the plan of exchange: Provided, that the plan of exchange (i) shall specify that all certificates representing shares of stock of the domestic company may, after the plan of exchange becomes effective, be exchanged for shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof upon such terms as shall be specified in the plan of exchange, and (ii) may require that all certificates representing shares of stock of the domestic company shall, after the plan of exchange becomes effective, represent only the right to receive shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof upon such terms as shall be specified in the plan of exchange. (1967, c. 938.)

§ 58-86.7. **Authorized insurance business and regulatory authority.**—(a) Nothing contained in this article shall be construed to authorize any insurance company to engage in any kind or kinds of insurance business not author-

ized by its articles of incorporation, or to authorize any acquiring corporation which is not an insurance company to engage directly in the business of insurance. Subsequent to the effective date of the plan of exchange, the Commissioner having regard to the findings stated in subdivision (2) of G.S. 58-86.4, shall have the authority to require that the affairs of the domestic company be conducted in such manner as to assure the continuing safe conduct and transaction of the domestic company's business of insurance.

(b) If at any time the Commissioner finds, after due notice and opportunity to be heard as provided by G.S. 58-9.2, that the business and affairs of the acquiring corporation are of such nature or are conducted in such manner as to endanger the continued solvency of any domestic insurance company, to be harmful to any domestic insurance company, or to impair the rights of any policyholder, he shall issue such written order or orders as he deems appropriate to assure that the business and affairs of the acquiring corporation are of such nature and are conducted in such manner as to no longer endanger the solvency of any domestic insurance company, to be harmful to any domestic insurance company, or to impair the rights of any policyholder, including an order requiring the acquiring corporation to divest itself of the stock of the domestic company.

(c) The Commissioner may examine, at such time or times as he may deem appropriate, the financial and business affairs of the acquiring corporation, and in connection with any such examination or examinations the acquiring corporation shall make available its books, records and accounts, and the Commissioner may require from the acquiring corporation and its officers, directors and employees the submission of such written or oral statements as the Commissioner may deem necessary or advisable. The cost of the examination shall be borne by the acquiring corporation at the same rate as is provided for under G.S. 58-63 (3).

(d) Any acquiring corporation which owns or controls any domestic insurance company shall be subject to all proxy solicitation and insider trading regulations promulgated from time to time by the Commissioner of Insurance pursuant to statutory authority.

(e) It shall be unlawful for any domestic insurance company which has exercised the privileges allowed by this article, except upon written approval by the Commissioner and subject to the provisions of G.S. 58-79,

- (1) To invest any of its funds in the capital stock, bonds, debentures, or other obligations of any acquiring corporation of which it is a subsidiary, or of any other subsidiary of any such acquiring corporation;
- (2) To accept the capital stock, bonds, debentures, or other obligations of any acquiring corporation of which it is a subsidiary or any other subsidiary of any such acquiring corporation, as collateral security for advances made to any person or company;
- (3) To purchase securities, other assets or obligations under repurchase agreement from any acquiring corporation of which it is a subsidiary or any other subsidiary of any such acquiring corporation; and
- (4) To make any loan, discount or extension of credit to any acquiring corporation of which it is a subsidiary or to any other subsidiary of any such acquiring corporation. (1967, c. 938.)

§ 58-86.8. **Powers of Commissioner not affected.**—Nothing in this article shall affect the power of the Commissioner to regulate, supervise and control insurance companies to the extent of and as provided by this chapter. (1967, c. 938.)

§ 58-86.9. **Application of article to other domestic corporations.**—Any such domestic corporation, other than a domestic insurance company, which shall acquire the majority of the voting capital stock of any domestic insurance company shall be subject to the regulations contained in this article; provided, however, that the provisions of this article shall not apply to any domestic cor-

poration which has acquired a domestic insurance company or companies prior to June 27, 1967. (1967, c. 938.)

ARTICLE 8.

Mutual Insurance Companies.

§ 58-95. Directors in mutual companies.—Every mutual insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the bylaws provide and until their successors are qualified. The directors need not be residents of this State or members of the company. In companies with a guaranty capital, one half of the directors shall be chosen by and from the stockholders. (1899, c. 54, s. 33; Rev., s. 4739; C. S., s. 6349; 1945, c. 386; 1971, c. 751.)

Editor's Note.—

The 1971 amendment rewrote the second sentence.

§ 58-96. Mutual companies with a guaranty capital.—A mutual insurance company formed as provided in this Chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of G.S. 58-77, or a mutual insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars (\$25,000) nor more than one million dollars (\$1,000,000), divided into shares of one hundred dollars (\$100.00) each, which shall be invested in the same manner as is provided in this Subchapter for the investment of the capital stock of insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to an annual dividend of not more than ten per centum (10%) on their respective shares, if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus may be reduced or retired by vote of the policyholders of the company and the assent of the Commissioner of Insurance, if the net assets of the company above its reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum (25%) of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than 30 days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the Commissioner of Insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (1899, c. 54, s. 34; Rev., s. 4740; 1911, c. 196, s. 3; C. S., s. 6350; 1945, c. 386; 1971, c. 752.)

Editor's Note.—

The 1971 amendment substituted "one million dollars (\$1,000,000)" for "three

hundred thousand dollars" in the first sentence and "ten per centum (10%)" for "eight per centum" in the second sentence.

ARTICLE 12A.

Insurer Holding Registration and Disclosure Act.

§ 58-124.1. **Definitions.**—As used in this Article, the following terms shall have the respective meanings hereinafter set forth, unless the context shall otherwise require:

- (1) **Affiliate.**—An “affiliate” of, or person “affiliated” with, a specific person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.
- (2) **Commissioner.**—The term “Commissioner” shall mean the Commissioner of Insurance of North Carolina, his deputies, or the Department of Insurance of North Carolina, as appropriate.
- (3) **Control.**—The term “control” (including the terms “controlling,” “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by G.S. 58-124.2(i) that control does not exist in fact. The Commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.
- (4) **Insurance Holding Company System.**—An “insurance holding company system” consists of two or more affiliated persons, one or more of which is an insurer.
- (5) **Insurer.**—The term “insurer” shall have the same meaning as set forth in G.S. 58-2(3) except that it shall not include (i) agencies, authorities or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state, (ii) fraternal benefit societies, (iii) nonprofit medical and hospital service associations, or (iv) nonprofit dental service corporations.
- (6) **Person.**—A “person” is an individual, a corporation, a partnership, an association, a joint-stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert, but shall not include any securities broker performing no more than the usual and customary broker’s function.
- (7) **Subsidiary.**—A “subsidiary” of a specified person is an affiliate controlled by such person directly, or indirectly, through one or more intermediaries.
- (8) **Voting Security.**—The term “voting security” shall include any security convertible into or evidencing a right to acquire a voting security. (1971, c. 513, s. 1.)

Editor’s Note. — Section 3, c. 513, Session Laws 1971, makes the act effective on and after July 1, 1971.

§ 58-124.2. Registration of insurers.—(a) Registration.—Every insurer which is authorized to do business in this State and which is a member of an insurance holding company system shall register with the Commissioner, except a foreign insurer subject to disclosure requirements and standards adopted by statute or regulation in the jurisdiction of its domicile which are substantially similar to those contained in this section. Any insurer which is subject to registration under this section shall register within 60 days after July 1, 1971 or 15 days after it becomes subject to registration, whichever is later, unless the Commissioner for good cause shown extends the time for registration, and then within such extended time. The Commissioner may require any authorized insurer which is a member of a holding company system which is not subject to registration under this section to furnish a copy of the registration statement or other information filed by such insurance company with the insurance regulatory authority of its domiciliary jurisdiction.

(b) Information and Form Required.—Every insurer subject to registration shall file a registration statement on a form provided by the Commissioner, which shall contain current information about:

- (1) The capital structure, general financial condition, ownership and management of the insurer and any person controlling the insurer;
- (2) The identity of every member of the insurance holding company system;
- (3) The following agreements in force, relationships subsisting, and transactions currently outstanding between such insurer and its affiliates:
 - a. Loans, other investments, or purchases, sales or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;
 - b. Purchases, sales, or exchanges of assets;
 - c. Transactions not in the ordinary course of business;
 - d. Guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;
 - e. All management and service contracts and all cost-sharing arrangements, other than cost-allocation arrangements based upon generally accepted accounting principles; and
 - f. Reinsurance agreements covering all or substantially all of one or more lines of insurance of the ceding company; and
- (4) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the Commissioner.

(c) Materiality.—No information need be disclosed on the registration statement filed pursuant to G.S. 58-124.2(b) if such information is not material for the purposes of this section. Unless the Commissioner by rule, regulation or order provides otherwise, sales, purchases, exchanges, loans or extensions of credit, or investments, involving one half of one percent ($\frac{1}{2}\%$) or less of an insurer's admitted assets as of the thirty-first day of December next preceding, shall not be deemed material for purposes of this section.

(d) Amendments to Registration Statements.—Each registered insurer shall keep current the information required to be disclosed in its registration statement by reporting all material changes or additions on amendment forms provided by the Commissioner within 15 days after the end of the month in which it learns of each such change or addition, provided, however, that subject to G.S. 58-124.3(c), each registered insurer shall so report all dividends and other distributions to shareholders within two business days following the declaration thereof.

(e) Termination of Registration.—The Commissioner shall terminate the reg-

istration of any insurer which demonstrates that it no longer is a member of an insurance holding company system.

(f) Consolidated Filing.—The Commissioner may require or allow two or more affiliated insurers subject to registration hereunder to file a consolidated registration statement or consolidated reports amending their consolidated registration statement or their individual registration statements.

(g) Alternative Registration.—The Commissioner may allow an insurer which is authorized to do business in this State and which is part of an insurance holding company system to register on behalf of any affiliated insurer which is required to register under subsection (a) above and to file all information and material required to be filed under this section.

(h) Exemptions.—The provisions of this section shall not apply to any insurer, information or transaction if and to the extent that the Commissioner by rule, regulation, or order shall exempt the same from the provisions of this section.

(i) Disclaimer.—Any person may file with the Commissioner a disclaimer of affiliation with any authorized insurer or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such insurer as well as the basis for disclaiming such affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with such person unless and until the Commissioner disallows such a disclaimer. The Commissioner shall disallow such a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support such disallowance.

(j) Violations.—The failure to file a registration statement or any amendment thereto required by this section within the time specified for such filing shall be a violation of this section. (1971, c. 513, s. 1.)

§ 58-124.3. Standards. — (a) Transactions with Affiliates. — Material transactions by registered insurers with their affiliates shall be subject to the following standards:

- (1) The terms shall be fair and reasonable;
- (2) The books, accounts and records of each party shall be so maintained as to clearly and accurately disclose the precise nature and details of the transactions; and
- (3) The insurer's surplus as regards policyholders following any dividends or distributions to shareholder affiliates shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(b) Adequacy of Surplus.—For purposes of this Article, in determining whether an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the following factors, among others, shall be considered:

- (1) The size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, insurance in force and other appropriate criteria;
- (2) The extent to which the insurer's business is diversified among the several lines of insurance;
- (3) The number and size of risks insured in each line of business;
- (4) The extent of the geographical dispersion of the insurer's insured risks;
- (5) The nature and extent of the insurer's reinsurance program;
- (6) The quality, diversification, and liquidity of the insurer's investment portfolio;
- (7) The recent past and projected future trend in the size of the insurer's surplus as regards policyholders;

- (8) The surplus as regards policyholders maintained by other comparable insurers;
- (9) The adequacy of the insurer's reserves; and
- (10) The quality and liquidity of investments in subsidiaries. The Commissioner may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in his judgment such investment so warrants.

(c) Dividends and Other Distributions.—No insurer subject to registration under G.S. 58-124.2 shall pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until (i) 30 days after the Commissioner has received notice of the declaration thereof and has not within such period disapproved such payment, or (ii) the Commissioner shall have approved such payment within such 30-day period.

For purposes of this section, an extraordinary dividend or distribution includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions made within the preceding 12 months exceeds the greater of (i) ten percent (10%) of such insurer's surplus as regards policyholders as of the thirty-first day of December next preceding, or (ii) the net gain from operations of such insurer, if such insurer is a life insurer, or the net investment income, if such insurer is not a life insurer, for the 12-month period ending the thirty-first day of December next preceding, but shall not include pro rata distributions of any class of the insured's own securities.

Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution which is conditional upon the Commissioner's approval thereof, and such a declaration shall confer no rights upon shareholders until (i) the Commissioner has approved the payment of such dividend or distribution or (ii) the Commissioner has not disapproved such payment within the 30-day period referred to above. (1971, c. 513, s. 1.)

§ 58-124.4. Examination.—(a) Power of Commissioner.—Subject to the limitation contained in this section and in addition to the powers which the Commissioner has under G.S. 58-16, relating to the examination of insurers, the Commissioner shall also have the power to order any insurer registered under G.S. 58-124.2 to produce such records, books, or other information papers in the possession of the insurer or its affiliates as shall be necessary to ascertain the financial condition or legality of conduct of such insurer. In the event such insurer fails to comply with such order, the Commissioner shall have the power to examine such affiliates to obtain such information.

(b) Purpose and Limitation of Examination.—The Commissioner shall exercise his power under subsection (a) above only if the examination of the insurer under G.S. 58-16 is inadequate or the interests of the policyholders of such insurer may be adversely affected.

(c) Use of Consultants.—The Commissioner may retain at the registered insurer's expense such attorneys, actuaries, accountants and other experts not otherwise a part of the Commissioner's staff as shall be reasonably necessary to assist in the conduct of the examination under subsection (a) above. Any persons so retained shall be under the direction and control of the Commissioner and shall act in a purely advisory capacity.

(d) Expenses.—Each registered insurer producing for examination records, books and papers pursuant to subsection (a) above shall be liable for and shall pay the expense of such examination in accordance with the provisions of G.S. 58-16. (1971, c. 513, s. 1.)

§ 58-124.5. Confidential treatment.—All information, documents and copies thereof obtained by or disclosed to the Commissioner or any other person in the course of an examination or investigation made pursuant to G.S. 58-124.4, and

all information reported pursuant to G.S. 58-124.2, shall be given confidential treatment and shall not be made public by the Commissioner or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains, unless the Commissioner, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interests of policyholders, shareholders or the public will be served by the publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate. (1971, c. 513, s. 1.)

§ 58-124.6. Rules and regulations.—The Commissioner may, upon notice and opportunity for all interested persons to be heard, issue such rules, regulations, and orders as shall be necessary to carry out the provisions of this Article. (1971, c. 513, s. 1.)

§ 58-124.7. Injunctions.—Whenever it appears to the Commissioner that any insurer or any director, officer, employee or agent thereof has committed or is about to commit a violation of this Article or of any rule, regulation, or order issued by the Commissioner hereunder, the Commissioner may apply to the superior court for the county in which the principal office of the insurer is located or if such insurer has no such office in this State then to the Superior Court for Wake County for an order enjoining such insurer or such director, officer, employee or agent thereof from violating or continuing to violate this Article or any such rule, regulation or order, and for such other equitable relief as the nature of the case and the interests of the insurer's policyholders, creditors and shareholders or the public may require. (1971, c. 513, s. 1.)

§ 58-124.8. Criminal proceedings.—Whenever it appears to the Commissioner that any insurer or any director, officer, employee or agent thereof has committed a willful violation of this Article, the Commissioner may cause criminal proceedings to be instituted in the court having criminal jurisdiction for the county in which the principal office of the insurer is located or if such insurer has no such office in the State, then in the criminal court for Wake County against such insurer or the responsible director, officer, employee or agent thereof. Any insurer which willfully violates this Article may be fined not more than five hundred dollars (\$500.00). Any individual who willfully violates this Article may be fined not more than five hundred dollars (\$500.00) or, if such willful violation involves the deliberate perpetration of a fraud upon the Commissioner, imprisoned not more than two years, or both. (1971, c. 513, s. 1.)

§ 58-124.9. Receivership.—Whenever it appears to the Commissioner that any person has committed a violation of this Article which so impairs the financial condition of a domestic insurer as to threaten insolvency or make the further transaction of business by it hazardous to its policyholders, creditors, shareholders or the public, then the Commissioner may proceed under G.S. 1-507.1 and G.S. 58-155.11 to take possession of the property of such domestic insurer and to conduct the business thereof. (1971, c. 513, s. 1.)

§ 58-124.10. Revocation, suspension, or nonrenewal of insurer's license.—Whenever it appears to the Commissioner that any person has committed a violation of this Article which makes the continued operation of an insurer contrary to the interests of policyholders or the public, the Commissioner may, after giving notice and an opportunity to be heard, determine to suspend, revoke or refuse to renew such insurer's license or authority to do business in this State for such period as he finds is required for the protection of policyholders or the public. Any such determination shall be accompanied by specific findings of fact and conclusions of law. (1971, c. 513, s. 1.)

§ 58-124.11. Judicial review; mandamus.—(a) Any person aggrieved by any order made by the Commissioner pursuant to this Article may appeal therefrom in accordance with the provisions of G.S. 58-9.3.

(b) Any person aggrieved by any failure of the Commissioner to act or make a determination required by this Article may petition the Superior Court of Wake County for a writ in the nature of a mandamus or a peremptory mandamus directing the Commissioner to act or make such determination forthwith. (1971, c. 513, s. 1.)

Editor's Note. — Section 2, c. 513, Session Laws 1971, effective on and after July 1, 1971, contains a severability clause."

ARTICLE 13.

Fire Insurance Rating Bureau.

§ 58-125. North Carolina fire insurance rating bureau created.

The purpose of this article is to provide for the public, at reasonable cost, insurance in financially responsible companies. Not only fair play, but the accomplishment of this legislative purpose as well, requires that the premium be fixed at a level which will enable the insuring company (i.e., the entire insurance industry in this State treated as if it were one company) (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a "fair and reasonable profit" and no more. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The statutory plan of this article contemplates a uniform premium rate schedule for all companies operating in the State. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

In the statutory plan, the State has undertaken to make available to its people the economic necessity of fire insurance policies which actually insure by authorizing the bureau to propose premium rates just as would a single company having a monopoly of the fire insurance business in North Carolina. To protect the public against the danger of exorbitant rates for this economic necessity, which danger is inherent in monopolistic price fixing, the legislature has vested in the Commissioner its own authority to withhold approval of such rates proposed by the bureau and to fix rates which are fair and reasonable. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-126. Scope of article.

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-127. Rating bureau.

The problem for the rate maker is to determine what amount, collected as premiums at the inception of the policies here-

Purpose, etc., of Bureau and of State Automobile Rate Administrative Office Compared.—The purpose and duties of the North Carolina Fire Insurance Rating Bureau created by this section are quite similar to the purpose and duties of the North Carolina Automobile Rate Administrative Office created by § 58-246. The Commissioners have similar statutory guidelines in considering adjustment of fire insurance rates and adjustment of automobile bodily injury and property damage insurance rates. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

The bureau is to be regarded as if it were the only insurance company operating in North Carolina, for rate-making purposes, and as if it had an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of those of the companies actually in operation. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

There is no presumption that a rate filing by the bureau is correct and proper. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The burden is upon the bureau to show that the rate schedule proposed by it is fair and reasonable and that it does not discriminate unfairly between risks. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

after to be issued, will enable the company (1) to pay losses to be incurred during the life of such policies, at replacement costs

prevailing at the time of such losses, (2) to pay other proper operating expenses of the company, and (3) to retain a "fair and reasonable profit." In re North Carolina

Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Cited in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-130. Statistical reports.

Quoted in *In re North Carolina Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131. Reasonableness of rates.

Quoted in *In re North Carolina Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.1. Approval of rates.

The Commissioner need not approve or disapprove a filing by the bureau in its entirety. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

There is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The bureau may amend its filing so as to propose a smaller increase in premium

rates than that proposed in the original filing, but, in the absence of such amendment, the Commissioner, upon proper findings of fact supported by substantial evidence, may fix premium rates at a level such as to allow part but not all of the increase proposed by the bureau. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Applied in *State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen.*, 16 N.C. App. 724, 193 S.E.2d 432 (1972).

§ 58-131.2. Reduction or increase of rates.

The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a "fair and reasonable profit" in the immediate future (i.e., treating the bureau as if it were an operating company whose experience in the past is the composite of the experiences of all of the operating companies), and, if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percent of earned premiums which will constitute a "fair and reasonable profit" in that period. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); *State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen.*, 16 N.C. App. 724, 193 S.E.2d 432 (1972).

The Commissioner's projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence (§ 58-9.3) and if he has taken into account all of the relevant facts which he is directed by statute to consider. In re North Carolina

Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Statute Determinative of What Things Are Proper for Consideration by Commissioner.—The expert opinion of a witness, however well informed, as to what things are proper for consideration by the Commissioner in making his projection is not determinative. That is a matter determined by the provisions of the statute. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Formulating new rate-making procedures is a policy matter and should rest with the Commissioner. In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

But Not Consideration of Prevailing Cost Trends.—In its holding that consideration of a prevailing cost trend, established by otherwise competent and credible evidence, is "a policy matter and should rest with the Commissioner," the Court of Appeals erred and to that extent its decision is hereby reversed. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

A "fair and reasonable profit" varies from time to time, like construction costs and consumer prices. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165

S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

Premium Rates Not Fixed Retroactively.—It is not only impractical to fix premium rates retroactively, it is expressly required by this section that premium rates fixed in accordance with the statutory plan be applied only to policies issued after the rates are so established. Consequently, the entire procedure contemplates a looking to the future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Insurance rate making is a technical, complicated and involved procedure carried on by trained men. It is not an exact science. Judgment based upon a thorough knowledge of the problem must be applied. Courts cannot abdicate their duty to examine the evidence and the adjudication, and to interpret and apply the law, but they must recognize the value of the judgment of an insurance commissioner who is specializing in the field of insurance and the efficacy of an adjudication supported by evidence of experts who devoted a lifetime of service to rate making. In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

Fixing Premium Rate Is Exercise of Legislative Power.—In fixing by law the premium rate, it is the legislative power of the State which is being exercised. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Duty Imposed by Section.—This section imposes upon the Commissioner the duty of fixing such rates as will produce "a fair and reasonable profit" and no more. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Compliance with Statutory Procedures and Standards.—The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute. In exercising that authority he must comply with the statutory procedures and standards. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The use of past experience to estimate future needs involves, of necessity, a projection of known data into the unknown future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

A "reasonable profit" cannot be determined until there is first a determination of reasonable expenses attributable to

the business operated in this State. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Six Cents Out of Each Dollar as "Fair and Reasonable Profit".—Whether six cents out of each dollar of gross revenue, i.e., earned premiums, is a fair and reasonable profit, an excessive profit, or an insufficient profit must be determined by the Commissioner from evidence, and this involves a projection into the future of past experience and present conditions. It involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

"Prospective Loss Experience" and "Loss Trend".—"Prospective loss experience" and the present "loss trend" relate not only to the number of fires and to the extent of the physical destruction thereby, but also to the cost of replacement of the destroyed property. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Stopping Adjusting Process After Bringing Past Experience to Present Level.—To bring past experience to the present level by pro forma adjustments of premiums earned and losses incurred, and then to stop the adjusting process, is to project into the future the assumption that there will be no further change in the incidence of fires, in the extent of physical destruction thereby, or in the cost of replacing the destroyed property. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The determination of the cost of replacing losses to be incurred at price levels then to prevail is a matter of informed judgment and not of precise calculation. Such judgment can be formed only by consideration both of the past experience and of the present prevailing conditions. This is true both as to the number and physical extent of the losses to be anticipated and as to the cost of replacing such losses as they occur. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Recent events reliably indicating a rise or a fall in replacement costs previously experienced is a relevant circumstance in determining the extent to which past experience supplies a reliable guide to the future in the matter of replacement costs. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Adjustment of Past Loss Experience.—The past loss experience should be adjusted

to take into account any newly discovered practicable procedures and devices for reducing the risk of fire. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence of "Reasonable and Related Factors".—Evidence, otherwise competent, of a cost trend, upward or downward, which continues from the past into the present, and expert testimony, otherwise competent, that such trend may reasonably be expected to continue into the future, so that future costs will be higher or lower than present costs, is evidence of "reasonable and related factors" which this section requires the Commissioner to consider in making his own projection into the future. It is not a proper ground for the rejection of such evidence that such projection of an upward or downward cost trend into the future has never before been used in the rate-making process. The statute does not contemplate that procedures and methods for determining replacement costs for the future shall be frozen. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Statistical evidence which becomes available at any time during a public hearing for the establishment of fire insurance rates and the use of which will produce no unreasonable delay should be admitted and taken into consideration in fixing rates. In

§ 58-131.3. Deviations.

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.5. Hearing.

Matters within Discretion of Commissioner.—It is within the sound discretion of the Commissioner to require complex statistical exhibits to be made available to the adverse party prior to the hearing, to restrict or deny the use of newly developed statistical data sprung suddenly at the hearings by either party to the surprise of the other, and to grant such recess of the hearing as he may deem necessary to permit reasonable opportunity to study such data and to prepare evidence to refute it. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

This section clearly contemplates the introduction of relevant and otherwise competent evidence at the rehearing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Such Evidence Is Not Limited to Conditions Prevailing At or Before Date of Filing.—Neither the Department of Insurance,

re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Testimony of Actuary.—The presence in the record of testimony of the actuary for the Department of Insurance that, in his admittedly expert opinion, it would not be "conservative" or "proper" for the Commissioner, in fixing rates for the future, to consider a projection of the present and past cost trend does not afford a basis for calling into play the statutory presumption that the order of the Commissioner, resting upon the same conclusion, is correct and proper because "supported by substantial evidence." It is held that otherwise competent opinion evidence as to such projection is, as a matter of law, relevant to the determination by the Commissioner of the probable loss experience of the companies during the life of policies to be issued in the near future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence that present conditions are not those which prevailed during former experience is relevant to the translation of the past experience into an informed judgment concerning the future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

any other protestant, nor the bureau is confined to evidence relating to conditions prevailing at the date of the filing and to experience prior thereto. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

While the statute requires that a hearing by the Commissioner upon a filing by the bureau be held promptly, it is well within the bounds of possibility that, between the filing and the hearing, experience may be had which would be most relevant to the determination of the direction of a projection of the present "loss trend" into the future. Such change in conditions after the date of the filing might indicate a sharply downward trend in construction costs or in fire hazard. Surely, the statute does not contemplate that the Commissioner should shut his eyes to such a change in conditions after the date of the filing. It is equally clear

that the bureau may offer evidence of more recent experience which corroborates its allegations in the filing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Where the Commissioner simply ruled, as a matter of law, that all evidence, however relevant, would be cut off as of the date of the filing, he did not follow the mandate of the statute. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence relevant to the issues involved in the original hearing and to the reasons stated in the petition for rehearing, if otherwise competent, is admissible at a rehearing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Application for rehearing, itself, automatically stays former order of Commissioner. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.8. Review of order of Commissioner.

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

ARTICLE 14.

Real Estate Title Insurance Companies.

§ 58-132. **Purpose of organization; formation.**—(a) Companies may be formed in the manner provided in this Article for the purpose of furnishing information in relation to titles to real estate and of insuring owners and others interested therein against loss by reason of encumbrances and defective title; provided, however, that no such information shall be so furnished nor shall such insurance be so issued as to North Carolina real property unless and until the title insurance company has caused to be conducted a reasonable examination of the title, has obtained the opinion thereof of an attorney, not an employee of the company, licensed to practice law in North Carolina, and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies.

(b) Such companies shall be subject to:

- (1) The same capital, surplus and investment requirements as govern the formation and operation of domestic stock casualty companies.
- (2) The same deposit requirements governing the operation of other state or foreign casualty companies in this State; and
- (3) Article 17A of the Insurance Law of this State and G.S. 58-39. Such companies shall not be subject to the Insurance Law of this State except as otherwise provided in this Article.

(c) This Article shall not be interpreted so as to imply the repeal or amendment of any of the provisions of Chapter 84 of the General Statutes of North Carolina nor of any other provisions of common law or statutory law governing the practice of law. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6395; 1923, c. 71; 1973, c. 128.)

Editor's Note.—The 1973 amendment, effective Oct. 1, 1973, rewrote this section.

§ 58-134.1. **Investment of capital.**—Any real estate title insurance company having a capital stock of more than fifty thousand dollars (\$50,000.00), may, with the consent of the Commissioner, after investing fifty thousand dollars (\$50,000.00) of the capital, as provided in this chapter, invest not to exceed one fourth of the total capital stock in abstract or title plants; and no such company shall guarantee or insure in any one risk on real property located in North Carolina more than forty percent (40%) of its combined capital and surplus

without first having the approval of the Commissioner, which approval shall be endorsed upon the policy. (1945, c. 386; 1967, c. 936.)

Editor's Note. — The 1967 amendment inserted "on real property located in North Carolina" and deleted "of North Carolina" following "Commissioner" near the end of the section.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 58-134.2. Unearned premium reserve. — Every domestic title insurance company shall, in addition to other reserves, establish and maintain a reserve to be known as the "unearned premium reserve" for title insurance, which shall at all times and for all purposes be considered and constitute unearned portions of the original risk premiums and shall be charged as a reserve liability of such title insurance company in determining its financial conditions. (1969, c. 897.)

§ 58-134.3. Amount of unearned premium reserve. — (a) The unearned premium reserve of every domestic title insurance company shall consist of the aggregate of:

- (1) The amount of the unearned premium reserve held as of June 19, 1969.
- (2) The amount of all additions required to be made to such reserve by this section, less the reduction of such aggregate amount required hereby.

(b) On each contract of title insurance issued by a domestic title insurance company on and after June 19, 1969, there shall be reserved initially as an unearned premium reserve a sum equal to ten per centum (10%) of the original risk premium charged therefor.

(c) After the aggregate of the amounts set aside in unearned premium reserves reaches a total of one hundred fifty thousand dollars (\$150,000.00) then those amounts set aside in any calendar year pursuant to subsection (b) of this section, shall be reduced annually, at the end of each calendar year following the year in which the policy is issued, at the annual rate of one twentieth of the aggregate of such amounts. Provided, the aggregate total of the unearned premium reserves shall not be reduced below one hundred fifty thousand dollars (\$150,000.00); provided, however, that if the laws of another jurisdiction in which a domestic title insurance company is licensed has requirements for the maintenance of reserves in excess of those contained in this section, such requirements shall be complied with.

(d) The entire amount of the unearned premium reserve held as of June 19, 1969 shall be presumed to have been added to the reserve in the calendar year next preceding June 19, 1969 and shall be released from said reserve and restored to net profits at the annual rate of one twentieth of the said entire amount.

(e) If substantially the entire outstanding liability under all policies, contracts of title insurance or reinsurance agreements of any such title insurance company shall be reinsured, the value of the consideration received by a reinsuring title insurance company authorized to transact the business of title insurance in this State, shall constitute, in its entirety, unearned portions of original premiums and be added to its unearned premium reserve and deemed, for recovery purposes, to have been provided for liabilities assumed during the year of such reinsurance. The amount of such addition to the unearned premium reserve of such assuming title insurance company shall be not less, however, than two thirds of the amount of the unearned premium reserve required to be maintained by the ceding title insurance company at the time of such reinsurance. (1969, c. 897.)

§ 58-134.4. Unearned premium reserve on policies issued by foreign or alien title insurance companies.—Every foreign or alien title insurance company licensed to transact title insurance in this State shall reserve and maintain the same reserves as are required of domestic companies under the provi-

sions of G.S. 58-134.4 [58-134.3], unless by the laws of the state or country of domicile of such company there is required to be set aside and maintained an unearned premium reserve in at least as great an amount as is required of domestic companies by that section. (1969, c. 897.)

§ 58-134.5. Maintenance of the unearned premium reserve.—If by reason of any cause, other than depreciation in the market value of investments, the amount of the assets of a title insurance company held as investments of its unearned premium reserve should on any date be less than the amount required to be maintained by law in such reserve, and the deficiency shall not be promptly cured, such title insurance company shall forthwith give written notice thereof to the Commissioner and shall make no further policies, contracts of title insurance or reinsurance agreements of title insurance until the deficiency shall have been eliminated and until it shall have received written approval from the Commissioner authorizing it to again issue such policies, contracts of title insurance or agreements. (1969, c. 897.)

§ 58-134.6. Use of the unearned premium reserve on liquidation, dissolution or insolvency.—(a) If a title insurance company becomes insolvent, or is in the process of liquidation or dissolution, or in the possession of the Commissioner:

- (1) Such amount of the assets of such title insurance company equal to the unearned premium reserve then remaining as is necessary may be used by or with the written approval of the Commissioner, to pay for reinsurance of the liability of such title insurance company upon all outstanding policies or contracts or reinsurance agreements of title insurance, as to which claims for losses by the holders are not then pending, the balance, if any, of assets equal to the unearned premium reserve fund then remaining, then to be transferred to the general assets of the title insurance company.
- (2) The assets other than the unearned premium reserve shall be available to pay claims for losses sustained by holders of policies then pending or arising up to the time reinsurance is effected. In the event that claims for losses are in excess of such other assets of the title insurance company, such claims, when established, shall be paid pro rata out of the surplus assets attributable to the unearned premium reserve, to the extent of such surplus, if any.

(b) In the event that reinsurance is not obtained, the unearned premium reserve and assets constituting minimum capital, or so much as remains thereof after outstanding claims have been paid, shall constitute a trust fund to be held by the Commissioner for twenty years, out of which claims of policyholders shall be paid as they arise. The balance, if any, of such fund shall, at expiration of twenty years, revert to the general assets of the title insurance company. (1969, c. 897.)

ARTICLE 16.

Reciprocal or Inter-Insurance Exchanges.

§ 58-148. Application of other sections. — Except as otherwise provided in this article, and except where the context otherwise requires, all of the provisions of this chapter relating to all insurers and those relating to insurers transacting the same kind or kinds of insurance which reciprocal insurers are permitted to transact, shall be applicable to reciprocal insurers authorized to do business in this State. Where any of such sections refer to a corporation, company or insurer, the same, when read in connection with and applicable to this

article shall be deemed to mean a reciprocal insurer. (1913, c. 183, s. 13; C. S., s. 6409; 1945, c. 386.)

Editor's Note.—

This section is set out above to correct

an error appearing in the replacement volume.

ARTICLE 16A.

"Lloyds" Insurance Associations.

§ 58-148.1. **"Lloyds" insurance associations may transact business of insurance other than life, on certain conditions.**—Associations of individuals, whether organized within the State or elsewhere, formed upon the plan known as "Lloyds"—whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by policy—may be authorized to transact business of insurance, other than life, in this State, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies regularly organized; but all such "Lloyds" whether organized within the State or elsewhere, shall make the same deposit, and upon the same terms and conditions as required by articles 17 and 20 of this chapter for foreign or alien insurance companies incorporated under the laws of any government or state other than the United States or one of the several states of the Union. Provided, such associations shall be subject to all of the laws and regulations of the State of North Carolina relating to the transaction of insurance business within this State. (1967, c. 844.)

ARTICLE 17.

Foreign or Alien Insurance Companies.

§ 58-153. **Service of legal process upon Commissioner of Insurance.**—As an alternative to service of legal process under the provisions of Rule 4 of the Rules of Civil Procedure, the service of such process upon any company licensed or admitted and authorized to do business in this State under the provisions of this Chapter may be made by the sheriff delivering and leaving a copy of such process in the office of the Commissioner of Insurance with a deputy duly appointed by the Commissioner for such purpose or acceptance of service of such process may be made by the Commissioner of Insurance or such duly appointed deputy. As a condition precedent to a valid service of process and of the action of the Commissioner in the premises, the party obtaining such service shall pay to the Commissioner of Insurance at the time of service or acceptance of service the sum of one dollar (\$1.00), which such party shall recover as part of the taxable costs if he prevails in his action. (1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; Rev., s. 4750; C. S., s. 6414; 1927, c. 167, s. 1; 1931, c. 287; 1951, c. 781, s. 9; 1971, c. 421, s. 1.)

Editor's Note.—

The Rules of Civil Procedure are found

The 1971 amendment, effective Oct. 1, in § 1A-1.
1971, rewrote this section.

§ 58-153.2. **Alternative service of process on insurers.**—In addition to the procedures set out in this chapter, insurers may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of chapter 1 and chapter 1A of the General Statutes. (1967, c. 954, s. 3.)

Editor's Note.—Session Laws 1969, c. 10, so as to make the 1967 act effective 803, amends Session Laws 1967, c. 954, s. Jan. 1, 1970. See Editor's note to § 1A-1.

§ 58-154. **Commissioner to notify company of service or acceptance of service of process.**—When service of legal process is made in the manner provided in G.S. 58-153, the Commissioner of Insurance or his duly appointed deputy shall within two business days thereafter notify the company served of such service or acceptance of service by registered or certified mail directed to its secretary,

or its resident manager in the case of a foreign company having no secretary in the United States. Such notification shall be accompanied by a copy of the process served or accepted and any pleading or order accompanying the process. The Commissioner shall keep a record which shall show the day and hour of such service or acceptance of service of process and whether any pleading or order accompanied the process. When service is made under the provisions of G.S. 58-153, the time within which to file a responsive pleading, as provided by Chapter 1A of the General Statutes, shall be deemed extended by ten days. (1899, c. 54, s. 16; Rev., s. 4751; C. S., s. 6415; 1927, c. 167, s. 2; 1971, c. 421, s. 2.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§§ 58-155.37 to 58-155.40: Reserved.

ARTICLE 17B.

Post-Assessment Insurance Guaranty Association.

§ 58-155.41. **Short title.**—This Article shall be known and may be cited as the "Insurance Guaranty Association Act." (1971, c. 670, s. 1.)

Editor's Note.—Session Laws 1971, c. 670, s. 2, contains a severability clause.

§ 58-155.42. **Purpose of Article.**—The purpose of this Article is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers. (1971, c. 670, s. 1.)

§ 58-155.43. **Scope.**—This Article shall apply to all kinds of direct insurance, except life, annuities, title, surety, accident and health, credit, mortgage guaranty, ocean marine, and workmen's compensation and employer's liability insurance. (1971, c. 670, s. 1.)

§ 58-155.44. **Construction.**—This Article shall be liberally construed to effect the purpose under G.S. 58-155.42 which shall constitute an aid and guide to interpretation. (1971, c. 670, s. 1.)

§ 58-155.45. **Definitions.**—As used in this Article:

- (1) "Account" means any one of the two accounts created by G.S. 58-155.46.
- (2) "Association" means the North Carolina Insurance Guaranty Association created under G.S. 58-155.46.
- (3) "Commissioner" means the Commissioner of Insurance of North Carolina.
- (4) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State. "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

- (5) "Insolvent insurer" means (i) an insurer authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) determined to be insolvent by a court of competent jurisdiction.
- (6) "Member insurer" means any person who (i) writes any kind of insurance to which this Article applies under G.S. 58-155.43, including the exchange of reciprocal or inter-insurance contracts, and (ii) is licensed to transact insurance in this State.
- (7) "Net direct written premiums" means direct gross premiums written in this State on insurance policies to which this Article applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.
- (8) "Person" means any individual, corporation, partnership, association or voluntary organization. (1971, c. 670, s. 1.)

§ 58-155.46. **Creation of the Association.**—There is created a nonprofit, unincorporated legal entity to be known as the North Carolina Insurance Guaranty Association. All insurers defined as member insurers in G.S. 58-155.45(6) shall be and remain members of the Association as a condition of their authority to transact insurance in this State. The Association shall perform its functions under a plan of operation established and approved under G.S. 58-155.49 and shall exercise its powers through a board of directors established under G.S. 58-155.47. For purposes of administration and assessment, the Association shall be divided into two separate accounts: (i) the automobile insurance account; and (ii) the account for all other insurance to which the Article applies. (1971, c. 670, s. 1.)

§ 58-155.47. **Board of directors.**—(a) The board of directors of the Association shall consist of not less than five nor more than nine persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the Commissioner. Vacancies of the board shall be filled for the remaining period of the term in the same manner as initial appointments. If no members are selected within 60 days after June 25, 1971, the Commissioner may appoint the initial members of the board of directors.

(b) In approving selections to the board, the Commissioner shall consider among other things whether all member insurers are fairly represented.

(c) Members of the board may be reimbursed from the assets of the Association for expenses incurred by them as members of the board of directors. (1971, c. 670, s. 1.)

§ 58-155.48. **Powers and duties of the Association.**—(a) The Association shall:

- (1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, but such obligation shall include only that amount of each covered claim which is in excess of one hundred dollars (\$100.00) and is less than three hundred thousand dollars (\$300,000). In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.
- (2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

- (3) Allocate claims paid and expenses incurred among the two accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligation of the Association under subsection (a) above subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under G.S. 58-155.53 and other expenses authorized by this Article. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on the kinds of insurance in the account. Each member insurer shall be notified of the assessment not later than 30 days before it is due. No member insurer may be assessed in any year on any account an amount greater than two percent (2%) of that member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the Association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer if they are chargeable to the account for which the assessment is made.
- (4) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation and deny all other claims and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which such settlements, releases and judgments may be properly contested.
- (5) Notify such persons as the Commissioner directs under G.S. 58-155.50-(b)(1).
- (6) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but such designation may be declined by a member insurer.
- (7) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association and shall pay the other expenses of the Association authorized by this Article.
- (b) The Association may :
- (1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association.
 - (2) Borrow funds necessary to effect the purposes of this Article in accord with the plan of operation.
 - (3) Sue or be sued.
 - (4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this Article.
 - (5) Perform such other acts as are necessary or proper to effectuate the purpose of this Article.

- (6) Refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities if, at the end of any calendar year, the board of directors finds that the assets of the Association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year. (1971, c. 670, s. 1.)

§ 58-155.49. Plan of operation.—(a) The Association shall submit to the Commissioner a plan of operation and any amendment thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the Commissioner.

If the Association fails to submit a suitable plan of operation within 90 days following June 25, 1971, or if at any time thereafter the Association fails to submit suitable amendments to the plan, the Commissioner shall, after notice and hearing, adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this Article. Such rules shall continue in force until modified by the Commissioner or superseded by a plan submitted by the Association and approved by the Commissioner.

(b) All member insurers shall comply with the plan of operation.

(c) The plan of operation shall:

- (1) Establish the procedures whereby all the powers and duties of the Association under G.S. 58-155.48 will be performed.
- (2) Establish procedures for handling assets of the Association.
- (3) Establish the amount and method of reimbursing members of the board of directors under G.S. 58-155.47.
- (4) Establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the Association or its agent and a list of such claims shall be periodically submitted to the Association or similar organization in another state by the receiver or liquidator.
- (5) Establish regular places and times for meetings of the board of directors.
- (6) Establish procedures for records to be kept of all financial transactions of the Association, its agents, and the board of directors.
- (7) Provide that any member insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision.
- (8) Establish the procedures whereby selections for the board of directors will be submitted to the Commissioner.
- (9) Contain additional provisions necessary or proper for the execution of the powers and duties of the Association.

(d) The plan of operation may provide that any or all powers and duties of the Association, except those under G.S. 58-155.48(a)(3) and G.S. 58-155.48(b)(2), are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this Association, or its equivalent, in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance or [of] any other functions of the Association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the Commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this Article. (1971, c. 670, s. 1.)

§ 58-155.50. Duties and powers of the Commissioner. — (a) The Commissioner shall:

- (1) Notify the Association of the existence of an insolvent insurer not later than three days after he receives notice of the determination of the insolvency.
- (2) Upon request of the board of directors, provide the Association with a statement of the net direct written premiums of each member insurer.

(b) The Commissioner may:

- (1) Require that the Association notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this Article. Such notification shall be by mail at their last-known address, where available, but if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation shall be sufficient.
- (2) Suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the Commissioner may levy a fine on any member insurer which fails to pay an assessment when due. Such fine shall not exceed five percent (5%) of the unpaid assessment per month, except that no fine shall be less than one hundred dollars (\$100.00) per month.
- (3) Revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.

(c) Any final action or order of the Commissioner under this Article shall be subject to judicial review in accordance with the provisions of G.S. 58-9.3. (1971, c. 670, s. 1.)

§ 58-155.51. Effect of paid claims.—(a) Any person recovering under this Article shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association. Every insured or claimant seeking the protection of this Article shall cooperate with the Association to the same extent as such person would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the Association shall not operate to reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments.

(b) The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the Association or a similar organization in another state. The court having jurisdiction shall grant such claims priority equal to that to which the claimant would have been entitled in the absence of this Article against the assets of the insolvent insurer. The expenses of the Association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(c) The Association shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the Association and estimates of anticipated claims on the Association which shall preserve the rights of the Association against the assets of the insolvent insurer. (1971, c. 670, s. 1.)

§ 58-155.52. Nonduplication of recovery.—(a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to

exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under such insurance policy.

(b) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property. Any recovery under this Article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. (1971, c. 670, s. 1.)

§ 58-155.53. Prevention of insolvencies.—(a) To aid in the detection and prevention of insurer insolvencies, it shall be the duty of the board of directors, upon majority vote, to notify the Commissioner of any information indicating any member insurer may be insolvent or in a financial condition hazardous to the policyholders or the public.

(b) The board of directors may, upon majority vote, request that the Commissioner order an examination of any member insurer which the board in good faith believes may be in a financial condition hazardous to the policyholders or the public. Within 30 days of the receipt of such request, the Commissioner shall begin such examination. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by such persons as the Commissioner designates. The cost of such examination shall be paid by the Association and the examination report shall be treated as are other examination reports. In no event shall such examination report be released to the board of directors prior to its release to the public, but this shall not preclude the Commissioner from complying with subsection (c) below. The Commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the Commissioner but it shall not be open to public inspection prior to the release of the examination report to the public.

(c) It shall be the duty of the Commissioner to report to the board of directors when he has reasonable cause to believe that any member insurer examined or being examined at the request of the board of directors may be insolvent or in a financial condition hazardous to the policyholders or the public.

(d) The board of directors may, upon majority vote, make reports and recommendations to the Commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

(e) The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer insolvencies.

(f) The board of directors shall, at the conclusion of any insurer insolvency in which the Association was obligated to pay covered claims, prepare a report on the history and causes of such insolvency, based on the information available to the Association, and submit such report to the Commissioner. (1971, c. 670, s. 1.)

§ 58-155.54. Examination of the Association.—The Association shall be subject to examination and regulation by the Commissioner. The board of directors shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner. (1971, c. 670, s. 1.)

§ 58-155.55. Tax exemption.—The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions except taxes levied by its subdivisions on real or personal property. (1971, c. 670, s. 1.)

§ 58-155.56. Recognition of assessments in rates.—The rates and premiums charged for insurance policies to which this Article applies shall include amounts sufficient to recoup a sum equal to the amounts paid to the Association by the member insurer less any amounts returned to the member insurer by the Association and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer. (1971, c. 670, s. 1.)

§ 58-155.57. Immunity.—There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the Association or its agents or employees, the board of directors, or the Commissioner or his representatives for any action taken by them in the performance of their powers and duties under this Article. (1971, c. 670, s. 1.)

§ 58-155.58. Stay of proceedings; reopening of default judgments.—All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this State shall be stayed for 60 days from the date the insolvency is determined to permit proper defense by the Association of all pending causes of action as to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured, the Association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict or finding set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend against such claim on the merits. (1971, c. 670, s. 1.)

§ 58-155.59. Termination; distribution of funds.—(a) The Commissioner shall by order terminate the operation of the North Carolina Insurance Guaranty Association as to any kind of insurance covered by this Article with respect to which he has found, after hearing, that there is in effect a statutory or voluntary plan which:

- (1) Is a permanent plan which is adequately funded or for which adequate funding is provided; and
- (2) Extends, or will extend to the North Carolina policyholders and residents protection and benefits with respect to insolvent insurers not substantially less favorable and effective to such policyholders and residents than the protection and benefits provided with respect to such kinds of insurance under this Article.

(b) The Commissioner shall by the same such order authorize discontinuance of future payments by insurers to the North Carolina Insurance Guaranty Association with respect to the same kinds of insurance; provided, the assessments and payments shall continue, as necessary, to liquidate covered claims of insurers adjudged insolvent prior to said order and the related expenses not covered by such other plan.

(c) In the event the operation of the North Carolina Insurance Guaranty Association shall be so terminated as to all kinds of insurance otherwise within its scope, the Association as soon as possible thereafter shall distribute the balance of moneys and assets remaining (after discharge of the functions of the Association with respect to prior insurer insolvencies not covered by such other plan, together with related expenses) to the insurers which are then writing in this State policies of the kinds of insurance covered by this Article and which had made payments to the Association, pro rata upon the basis of the aggregate of such payments made by the respective insurers during the period of five years next preceding the date of such order. Upon completion of such distribution with respect to all of the kinds of insurance covered by this Article, this Article shall be deemed to have expired. (1971, c. 670, s 1.)

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18.

General Regulations of Business.

§ 58-160. **Policies for the benefit of mortgagees.**—Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee of the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. Any payment due by the insuring company to mortgagees or loss payees under the terms of the policy shall be made within ninety days of the loss or within sixty days of the filing of proof of loss, whichever is the longer period; provided, the payment of or settlement of the claim of the mortgagee or loss payee under the policy shall in no way constitute an admission of liability as to the insured and the fact of such payment or settlement shall be inadmissible in any action at law. (1899, c. 54, s. 41; Rev., s. 4757; C. S., s. 6420; 1969, c. 1077, s. 1.)

Editor's Note.—

The 1969 amendment added the second sentence.

Session Laws 1969, c. 1077, s. 3, provides: "This act shall be effective upon

ratification, but shall apply only to fire and extended coverage policies written after the date of its ratification." The act was ratified June 27, 1969.

ARTICLE 18A.

Fire and Extended Coverage for Beach Area Property.

§ 58-173.1. **Declarations and purpose of article.**—It is hereby declared by the General Assembly of North Carolina that an adequate market for fire and extended coverage insurance is necessary to the economic welfare of the beach area of the State of North Carolina and that without such insurance the orderly growth and development of the beach area of the State of North Carolina would be severely impeded; that furthermore, adequate insurance upon property in the beach area is necessary to enable homeowners and commercial owners to obtain financing for the purchase and improvement of their property; and that while the need for such insurance is increasing, the market for such insurance is not adequate and is likely to become less adequate in the future; and that the present plans to provide adequate insurance on property in the beach area, while deserving praise, have not been sufficient to meet the needs of this area. It is further declared that the State has an obligation to provide an equitable method whereby every licensed insurer writing fire and extended coverage in North Carolina is required to meet its public responsibility instead of shifting the burden to a few willing and public-spirited insurers. It is the purpose of this article to accept this obligation and to provide a mandatory program to assure an adequate market for fire and extended coverage insurance in the beach area of North Carolina. (1967, c. 1111, s. 1; 1969, c. 249.)

Revision of Article.—Session Laws 1969, c. 249 repealed the former article, consisting of eight sections, and substituted the

present sixteen sections therefor. The former article was codified from Session Laws 1967, c. 1111, s. 1.

§ 58-173.2. **Definition of terms.**—In this article, unless the context otherwise requires,

- (1) "Association" means the North Carolina Insurance Underwriting Association established pursuant to the provisions of this article;

- (2) "Beach area" means all of that area of the State of North Carolina south and east of the inland waterway from the South Carolina line to Fort Macon (Beaufort Inlet); thence south and east of Core, Pamlico, Roanoke and Currituck sounds to the Virginia line, being those portions of land generally known as the Outer Banks;
- (3) "Commissioner" means the Commissioner of Insurance of the State of North Carolina;
- (4) "Essential property insurance" means insurance against direct loss to property as defined and limited in the standard statutory fire policy and extended coverage endorsement thereon, as approved by the Commissioner;
- (5) "Insurable property" means real property at fixed locations in beach areas of the State as that term is hereinafter defined or the tangible personal property located therein, but shall not include insurance on motor vehicles, farm and manufacturing risks, which property is determined by the Association, after inspection and pursuant to the criteria specified in the plan of operation, to be in an insurable condition: Provided, however, any one and two family dwellings built in substantial accordance with the North Carolina Uniform Residential Building Code and any structure or building built in substantial compliance with the North Carolina Building Code, including the design-wind requirements, which is not otherwise rendered uninsurable by reason of use or occupancy, shall be an insurable risk within the meaning of this article, but neighborhood, area, location, environmental hazards beyond the control of the applicant or owner of the property shall not be considered in determining insurable condition. Provided further, that any structure commenced on or after January 1, 1970, not built in substantial compliance with the North Carolina Uniform Residential Building Code or the North Carolina Building Code, including the design-wind requirements therein, shall not be an insurable risk. The owner or applicant shall furnish with the application proof in the form of a certificate from a local building inspector, contractor, engineer or architect that the structure is built in substantial accordance with the North Carolina Uniform Residential Building Code or the North Carolina Building Code;
- (6) "Net direct premiums" means gross direct premiums (excluding reinsurance assumed and ceded) written on property in this State for fire and extended coverage insurance, including the fire and extended coverage components of homeowners and commercial multiple peril package policies as computed by the Commissioner, less return premiums upon cancelled contracts, dividends paid or credited to policyholders or the unused or unabsorbed portion of premium deposits, and further excluding premiums on farm properties and manufacturing risks;
- (7) "Plan of operation" means the plan of operation of the Association approved or promulgated by the Commissioner of Insurance, pursuant to the provisions of this article. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.3. North Carolina Insurance Underwriting Association created.—There is hereby created the North Carolina Insurance Underwriting Association, consisting of all insurers authorized to write and engage in writing within this State, on a direct basis, property insurance, except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, G.S. 58-77(5)d, and G.S. 58-77(7)b and except an insurer who only writes insurance in this State on property exempted from taxation by the provisions of G.S. 105-296 and G.S. 105-297. Every such insurer shall be a member of the Association and shall remain a member of the Association so long as the Association is in existence as a condition of its authority to continue to trans-

act the business of insurance in this State. (1967, c. 1111, s. 1; 1969, c. 249; 1971, c. 1067, s. 2.)

Editor's Note. — The 1971 amendment added "and except an insurer who only writes insurance in this State on property" at the end of the first sentence.

§ 58-173.4. Powers and duties of Association.—The Association shall, pursuant to the provisions of this article and the plan of operation, and with respect to essential property insurance on insurable property, have the power on behalf of its members:

- (1) To cause to be issued policies of insurance to applicants;
- (2) To assume reinsurance from its members;
- (3) To cede reinsurance to its members and to purchase reinsurance in behalf of its members. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.5. Temporary directors of Association.—Within ten days after April 17, 1969 the Commissioner shall appoint a temporary board of directors of this Association, which shall consist of eleven (11) representatives of members of the Association. Such temporary board of directors shall prepare and submit a plan of operation in accordance with § 58-173.7 and shall serve until the permanent board of directors shall take office in accordance with said plan of operation. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.6. Each member of Association to participate in its writings, expenses, profits and losses in proportion to net direct premium of such member.—All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premium of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as certified to the Association by the Commissioner after review of annual statements, other reports and any other statistics the Commissioner shall deem necessary to provide the information herein required and which the Commissioner is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall annually receive credit for essential property insurance voluntarily written in the beach area and its participation in the writings in the Association shall be reduced accordingly. Each member's participation in the Association shall be determined annually in the same manner as the initial determination. Any insurer authorized to write and engage in writing any insurance, the writing of which requires such insurer to be a member of the Association, pursuant to the provisions of G.S. 58-173.3 of this article, who is authorized and engaged in writing such insurance after April 17, 1969, shall become a member of the Association on the January 1 immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments.—Within ninety (90) days after April 17, 1969, the directors of the Association shall submit to the Commissioner for his review and approval, a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors, and shall grant proper credit annually to each member of the Association for essential property insurance voluntarily written in the beach area and shall provide for the efficient, economical, fair and nondiscriminatory administration of the Association and for the prompt and efficient provision of essential property insurance in the beach areas of North Carolina so as to promote orderly community development in those areas and to provide means for the adequate maintenance and improvement of the property in

such areas. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation; the establishment of necessary facilities; management of the Association; plan for the assessment of members to defray losses and expenses; underwriting standards; procedures for the acceptance and cession of reinsurance; procedures for determining the amounts of insurance to be provided to specific risks; time limits and procedures for processing applications for insurance and for such other provisions as may be deemed necessary by the Commissioner to carry out the purposes of this article.

The proposed plan shall be reviewed by the Commissioner and approved by him if he finds that such plan fulfills the purposes provided by G.S. 58-173.1 of this article. In the review of the proposed plan the Commissioner may, in his discretion, consult with the directors of the Association and may seek any further information which he deems necessary to his decision. If the Commissioner approves the proposed plan, he shall certify such approval to the directors and the plan shall become effective ten (10) days after such certification. If the Commissioner disapproves all or any part of the proposed plan of operation he shall return the same to the directors with his written statement for the reasons for disapproval and any recommendations he may wish to make. The directors may alter the plan in accordance with the Commissioner's recommendation or may within thirty (30) days from the date of disapproval return a new plan to the Commissioner. Should the directors fail to submit a proposed plan of operation within ninety (90) days of April 17, 1969, or a new plan which is acceptable to the Commissioner, or accept the recommendations of the Commissioner within thirty (30) days after his disapproval of the plan, the Commissioner shall promulgate and place into effect a plan of operation certifying the same to the directors of the Association. Any such plan promulgated by the Commissioner shall take effect ten (10) days after certification to the directors: Provided, however, that until a plan of operation is in effect, pursuant to the provisions of this article, any existing temporary placement facility may be continued in effect on a mandatory basis on such terms as the Commissioner may determine.

The directors of the Association may, subject to the approval of the Commissioner, amend the plan of operation at any time. The Commissioner may review the plan of operation at any time he deems expedient or prudent, but not less than once in each calendar year. After review of such plan the Commissioner may amend the plan after consultation with the directors and upon certification to the directors of such amendment. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.8. Persons eligible to apply to Association for coverage; contents of application.—(a) Any person having an insurable interest in insurable property, may, on or after the effective date of the plan of operation, be entitled to apply to the Association for such coverage and for an inspection of the property. Such application may be made on behalf of the applicant by a broker or agent authorized by him. Every such application shall be submitted on forms prescribed by the Association after consultation with the Commissioner, which application shall contain statement as to whether or not there is any unpaid premiums due from the applicant for fire insurance on the property.

The term "insurable interest" as used in this subsection shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

(b) If the Association determines that the property is insurable and that there is no unpaid premium due from the applicant for prior insurance on the property, the Association upon receipt of the premium, or such portion thereof, as is prescribed in the plan of operation, shall cause to be issued a policy of essential property insurance for a term of one (1) year. Any policy issued pursuant to the provisions of this section shall be renewed annually, upon application therefor, so long as the property meets the definition of "insurable property" set forth in G.S. 58-173.2 (5).

(c) If the Association, for any reason, denies an application and refuses to cause to be issued an insurance policy on insurable property to any applicant or takes no action on an application within the time prescribed in the plan of operation, such applicant may appeal to the Commissioner and the Commissioner, or a member of his staff designated by him, after reviewing the facts, may direct the Association to issue or cause to be issued an insurance policy to the applicant. In carrying out his duties pursuant to this section, the Commissioner may request, and the Association shall provide any information the Commissioner deems necessary to a determination concerning the reason for the denial or delay of the application. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.9. Association members may cede insurance to Association.—Any member of the Association may cede to the Association essential property insurance written on insurable property, to the extent, if any, and on the terms and conditions set forth in the plan of operation. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.10. Rates, rating plans and rate rules applicable.—The rates, rating plans and rating rules applicable to the insurance written by the Association shall be in accord with the manual rates in current usage throughout the State of North Carolina. No special surcharge (other than those presently in effect) may be applied to the fire or extended coverage rates of properties located in the beach area. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.11. Appeal from acts of Association to Commissioner; appeal from Commissioner to superior court.—Any person insured pursuant to this article, or his representative, or any affected insurer, who may be aggrieved by an act, ruling or decision of the Association, may, within thirty (30) days after such ruling appeal to the Commissioner. Any hearings held by the Commissioner of Insurance pursuant to such an appeal shall be in accordance with the procedure set forth in G.S. 58-9.2: Provided, however, the Commissioner of Insurance is authorized to appoint a member of his staff as deputy commissioner for the purpose of hearing such appeals and a ruling based upon such hearing shall have the same effect as if heard by the Commissioner. All persons or insureds aggrieved by any order or decision of the Commissioner of Insurance may appeal as is provided by the provisions of G.S. 58-9.3. (1967, c. 1111, s. 1; 1969, c. 249.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the last two sentences of the section.

§ 58-173.12. Reports of inspection made available.—All reports of inspection performed by or on behalf of the Association shall be made available to the members of the Association, applicants, agent or broker, and the Commissioner. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.13. Association and Commissioner immune from liability.—There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner of Insurance or any of his staff, the Association or its agents or employees, or against any participating insurer, for any inspections made hereunder or any statements made in good faith by them in any reports or communications concerning risks submitted to the Association, or at any administrative hearings conducted in connection therewith under the provisions of this article. (1967, c. 1111, s. 1; 1969, c. 249.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" near the beginning of the section.

§ 58-173.14. Association to file annual report with Commissioner.—The Association shall file in the office of the Commissioner on an annual basis

on or before July 1 a statement which shall summarize the transactions, conditions, operations and affairs of the Association during the preceding year. Such statement shall contain such matters and information as are prescribed by the Commissioner and shall be in such form as is approved by him. The Commissioner may at any time require the Association to furnish to him any additional information with respect to its transactions or any other matter which the Commissioner deems to be material to assist him in evaluating the operation and experience of the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.15. Commissioner may examine affairs of Association.—The Commissioner may from time to time make an examination into the affairs of the Association when he deems it to be prudent and in undertaking such examination he may hold a public hearing pursuant to the provisions of G.S. 58-9.2. The expenses of such examination shall be borne and paid by the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.16. Commissioner authorized to promulgate reasonable rules and regulations.—The Commissioner of Insurance shall have authority to make reasonable rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this article. The Commissioner shall not be liable for any act or omission in connection with the administration of the duties imposed upon him by the provisions of this article. (1967, c. 1111, s. 1; 1969, c. 249.)

ARTICLE 18B.

Fair Access to Insurance Requirements.

§ 58-173.17. Purpose of article.—It is the purpose of this article to provide a program whereby adequate basic property insurance may be made available to property owners having insurable property in urban areas of the State and to enable insurers doing business in the State to participate in the federal reinsurance provisions or Public Law 90-448, 90th Congress, August 1, 1968. It is further the purpose of this article to encourage the improvement of properties located in urban areas of the State and to arrest the decline of properties located in such areas. (1969, c. 1284.)

§ 58-173.18. Organization of underwriting association.—All insurers licensed to write and writing property insurance in this State on a direct basis are authorized, subject to the approval and regulation by the Commissioner, to establish and maintain a FAIR Plan (Fair Access to Insurance Requirements) and to establish and maintain an underwriting association and to formulate, and from time to time, to amend the plans and articles of the association and rules and regulations in connection therewith, and to assess and share on a fair and equitable basis all expenses, income and losses incident to such FAIR Plan and underwriting association in a manner consistent with the provisions of this article and in conformity with the Urban Property Protection and Reinsurance Act of 1968. (Title XI of Housing and Urban Development Act of 1968, Public Law 90-448, 90th Congress, August 1, 1969). (1969, c. 1284.)

§ 58-173.19. Participation in association.—Every insurer authorized to write basic property insurance in this State except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, G.S. 58-77(5)d and G.S. 58-77(7)b and except an insurer who only writes insurance on property exempted from taxation by the provisions of G.S. 105-296 and G.S. 105-297 shall be required to become and remain a member of the plan and underwriting association and comply with the requirements thereof as a condition of its authority to transact basic property insurance business in

the State of North Carolina. The premiums paid by insurers of North Carolina property to the National Insurance Development Fund for reinsurance, shall be used for the payment of losses occurring in this State and shall, to the extent not so used, be credited to the participation of such insurers in the reinsurance facility provided by this Article and the federal act. (1969, c. 1284; 1971, c. 1067, s. 1.)

Editor's Note. — The 1971 amendment inserted "and except an insurer who only writes insurance on property exempted from taxation by the provisions of G.S. 105-296 and G.S. 105-297" in the first sentence.

Opinions of Attorney General. — Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 333 (1969).

§ 58-173.20. Requirements of Plan and authority of association.—The association formed pursuant to the provisions of this article shall have authority on behalf of its members to cause to be issued basic property insurance policies, to reinsure in whole or in part, any such policies, and to cede any such reinsurance. The Plan adopted, pursuant to the provision of this article, shall provide, among other things, for the perils to be covered, the geographical areas of coverage, compensation and commissions, assessments of members, the sharing of expenses, income and losses on an equitable basis, cumulative weighted voting for the board of directors of the association, the administration of the Plan and association and any other matter necessary or convenient for the purpose of assuring fair access to insurance requirements, provided the same permits each member insurer thereof to qualify for federal insurance under the Urban Property Protection and Reinsurance Act of 1968. (1969, c. 1284.)

§ 58-173.21. Authority of Commissioner.—(a) Within 90 days following July 2, 1969, and before August 1, 1969, the directors of the association shall submit to the Commissioner of Insurance for his review, a proposed FAIR Plan and articles of the association consistent with the provisions of this article;

(b) The FAIR Plan and articles of association shall be subject to approval by the Commissioner and shall take effect 10 days after having been approved by him. If the Commissioner disapproves all or any part of the proposed Plan and articles, the directors of the association shall within 30 days submit for review an appropriately revised Plan and articles and if the directors fail to do so, the Commissioner shall thereafter promulgate such Plan and articles not inconsistent with the provisions of this article. (1969, c. 1284.)

§ 58-173.22. Temporary directors of association.—Within 10 days after July 2, 1969, the Commissioner shall appoint a temporary board of directors of the association, which temporary board of directors may prepare and submit a Plan of operation and articles of association in accordance with § 58-173.21. (1969, c. 1284.)

§ 58-173.23. Appeals; judicial review.—The association shall provide reasonable means, to be approved by the Commissioner, whereby any person or insurer affected by any act or decision of the administrators of the Plan or underwriting association, may be heard in person or by authorized representative, before the governing board of the association or a designated committee. Any person or insurer aggrieved by any decision of the governing board or designated committee, may be appealed to the Commissioner within 30 days from the date of such ruling or decision. The Commissioner, after hearing held pursuant to the procedure set forth in G.S. 58-9.2, shall issue an order approving or disapproving the act or decision with respect to the matter which is the subject of appeal. The Commissioner is authorized to appoint a member of his staff as deputy commissioner for the purpose of hearing such appeals and a ruling based on such hearing shall have the same effect as if heard by the Commissioner personally. All persons or insurers or their representatives aggrieved by any order or decision of

the Commissioner may appeal as provided by the provisions of G.S. 58-9.3. (1969, c. 1284.)

§ 58-173.24. Reports of inspection made available; immunity from liability.—All reports of inspection performed by or on behalf of the association shall be made available to the members of the association, applicants and the Commissioner. There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner, any of his staff, the association or any of its agents or employees, or against any participating insurer for any inspections made hereunder or any statements made in good faith by them in any reports or communications concerning risks submitted to the association, or at any administrative hearing conducted in connection therewith under the provisions of this article. (1969, c. 1284.)

§ 58-173.25. Riot reinsurance reimbursement fund; assessment of insurers.—In the event it shall become necessary because of loss occasioned in this State at any time since August 1, 1968, to reimburse the Secretary of the Department of Housing and Urban Development under the provisions of section 1223(a) (1) of the Urban Property Protection and Reimbursement Act of 1968, the Commissioner of Insurance shall assess all insurers engaged in the business of writing property insurance in the State in an amount sufficient to pay any unpaid reimbursements to the Secretary of the Department of Housing and Urban Development. Provided, that the amount assessed each insurer shall be in the same proportion that the premiums earned by each such insurer in this State bears to the aggregate premiums earned in this State by all insurance companies on those lines of property insurance for which reinsurance was available in this State from the Secretary of the Department of Housing and Urban Development during the preceding calendar year. All assessments made by the Commissioner of Insurance under this section shall be payable to the Treasurer of the State of North Carolina and he shall maintain a special fund designated as the "Riot Reinsurance Reimbursement Fund." All moneys received by the Treasurer pursuant to an assessment under this section shall be deposited in such special fund.

Whenever the Commissioner of Insurance shall certify to the Governor, the Council of State and the Treasurer of the State of North Carolina that it has become necessary to reimburse the Secretary of the Department of Housing and Urban Development under the provisions of the Urban Property Protection and Reinsurance Act of 1968, because of losses occasioned in this State since August 1, 1968, the Treasurer is hereby authorized and is directed to pay such amounts certified by the Commissioner of Insurance out of the Riot Reinsurance Reimbursement Fund to an extent, not exceeding in the aggregate for any one year, five percent (5%) of the aggregate property insurance premiums earned in this State during the preceding calendar year on those lines of insurance reinsured by the Secretary of Housing and Urban Development in this State during the current year. Nothing herein shall be construed to pledge the faith and credit of the State to any obligation or obligations. (1969, c. 1284.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insur-
ance Commissioner" throughout the section.

§ 58-173.26. Assessment; inability to pay.—In the event any insurer fails by reason of insolvency to pay any assessment as provided herein, the amount assessed each insurer, as computed under § 58-173.25, shall be immediately recalculated excluding therefrom the insolvent insurer so that its assessment is, in effect, assumed and redistributed among the remaining insurers. Such an assessment against an insolvent insurer shall not be a charge against any special deposit fund held under the provisions of article 20 of chapter 58 for the benefit of policyholders. (1969, c. 1284.)

§ 58-173.27. Termination; outstanding obligations.—This article shall expire on December 31, 1974, or after the expiration of the Urban Property Protection and Reimbursement Act of 1968, whichever shall first occur, except that rights and obligations incurred by the association and its members to be established pursuant to the provisions of this chapter shall not be impaired by the expiration of this article, and such association shall be continued for the purpose of performing such obligations. (1969, c. 1284.)

§ 58-173.28. Recoupment by insurers.—Any insurer assessed under the provisions of this article may add to the premiums applicable to the lines on which the assessment is levied an amount to be approved by the Commissioner of Insurance sufficient to recover within not more than three years an amount assessed under § 58-173.25 of this article during the preceding calendar year, together with the amounts, costs and expenses reasonably attributable to such assessment and recovery thereof. Every insurer adding to the premiums of its policyholders to make a recoupment under the provisions of this section, shall keep separate records as to the costs and expenses and as to the amounts collected and shall file copies of such records with the Commissioner of Insurance in the year following such recoupment. (1969, c. 1284.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" near the end of the section.

ARTICLE 19.

Fire Insurance Policies.

§ 58-176. Fire insurance contract; standard policy provisions.

I. GENERAL CONSIDERATION.

Standard Fire Policy Amended Effective Jan. 1, 1972.—Session Laws 1971, c. 476, s. 1, effective Jan. 1, 1972, amends this section by substituting "three years" for "twelve months" in line 161 of the Standard Fire Policy. Section 2 of the 1971 act provides that it shall not apply to any fire insurance policy issued prior to the effective date of the act.

Waiver by or Estoppel against Insurer from Act or Omission of Agent. — A waiver by, or an estoppel against, an insurer may arise from the act, conduct, omission, or knowledge of a duly authorized representative of the insurer acting within the scope of his actual or apparent authority. *Northern Assur. Co. of America v. Spencer*, 246 F. Supp. 730 (W.D.N.C. 1965).

Knowledge of Agent, etc.—

In the absence of fraud or collusion, and when acting within the scope of his authority, the agent's knowledge is in law the knowledge of the insurer, although not in fact communicated to the insurer. *Northern Assur. Co. of America v. Spencer*, 246 F. Supp. 730 (W.D.N.C. 1965).

Description of Property Covered as Located in Building Occupied by Insured Is Authorized.—Language insuring property located in a building occupied by the in-

sured is expressly authorized by this section. It is a material part of the contract; it cannot be ignored. *Parker v. Worcester Mut. Fire Ins. Co.*, 264 N.C. 339, 141 S.E.2d 466 (1965).

It Means Building So Occupied When Policy Was Issued.—Where a policy insured the contents of a building occupied by the insured, it meant the building occupied by insured when the policy was issued—not elsewhere. *Parker v. Worcester Mut. Fire Ins. Co.*, 264 N.C. 339, 141 S.E.2d 466 (1965).

Applied in *Gower v. Aetna Ins. Co.*, 281 N.C. 577, 189 S.E.2d 165 (1972); *Knapp v. Pennsylvania Nat'l Mut. Casual Ins. Co.*, 17 N.C. App. 455, 194 S.E.2d 572 (1973).

Quoted in *In re North Carolina Fire Ins. Rating Bureau*, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

Cited in *Firemen's Mut. Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 146 S.E.2d 53 (1966).

III. CERTAIN OTHER CONDITIONS.

Condition or Use of Property Provision May Be Waived.—An insurance company may waive, or be estopped to rely on, a provision or condition in a policy of insurance relating to use or condition of

property. *Northern Assur. Co. of America v. Spencer*, 246 F. Supp. 730 (W.D.N.C. 1965).

Same—Waiver of Proof of Loss.—

An insurance company which causes or induces the insured to delay in furnishing sufficient notice and proofs of loss thereby waives such delay. *Northern Assur. Co. of America v. Spencer*, 246 F. Supp. 730 (W.D.N.C. 1965).

**IV. LIABILITY OF INSURER
IN CASE OF LOSS; SUB-
ROGATION.**

Amount Recoverable.—

The amount which the company is obligated to pay is measured not by the cost of such replacement at the inception of the policy but by the cost of such replacement at the time of the fire. In re *North Carolina Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-177. Standard policy; permissible variations.

No specific form is necessary to constitute a binder as a valid contract of insurance. *Mayo v. American Fire and Cas. Co.*, 282 N.C. 346, 192 S.E.2d 828 (1972).

Binder Not Required to Set Forth All Terms of Contract.—It is not required that the writing, or oral communication, intended as a binder set forth all the terms of the contemplated contract of insurance. *Mayo v. American Fire & Cas. Co.*, 282 N.C. 346, 192 S.E.2d 828 (1972).

"Binder".—In an insurance parlance, a "binder" is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal

Insurer Subrogated, etc.—

In accord with original. See *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

V. LIABILITY OF AGENT.

Apparent Authority of Employee Ordinarily Determines Extent of Agent's Liability.—One dealing with an insurance agency under ordinary circumstances need not concern himself with the extent of the authority of an employee in the agent's office who undertakes to act for the agent; the apparent authority with which such employee is clothed by the agent renders him and his principal liable regardless of the actual limits of the authority of the employee. *Northern Assur. Co. of America v. Spencer*, 246 F. Supp. 730 (W.D.N.C. 1965).

policy can be issued, or until insured gives notice of its election to terminate. *Mayo v. American Fire & Cas. Co.*, 15 N.C. App. 309, 190 S.E.2d 398 (1972).

An extension of credit to the insured for the premium does not destroy the validity of the binder. *Mayo v. American Fire & Cas. Co.*, 282 N.C. 346, 192 S.E.2d 828 (1972).

Getting a rating from the Rating Bureau is not a prerequisite to entering into a contract of insurance. *Mayo v. American Fire & Cas. Co.*, 282 N.C. 346, 192 S.E.2d 828 (1972).

ARTICLE 20.

Deposits by Insurance Companies.

§ 58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.

Quoted in *Resolute Ins. Co. v. North Carolina*, 276 F. Supp. 660 (E.D.N.C. 1967).

§ 58-184. Sale of deposits for payment of liabilities.

Injunction against Sale of Securities under This Section Denied.—See *Resolute Ins. Co. v. North Carolina*, 276 F. Supp. 660 (E.D.N.C. 1967), aff'd, 397 F.2d 586 (4th Cir. 1968).

ARTICLE 21.

Insuring State Property.

§ 58-190. Appropriations; fund to pay administrative expenses.—Upon the expiration of the existing fire insurance policies on said properties and in making appropriations for any biennium after the next biennium, the Com-

missioner of Insurance shall file with the budget bureau his estimate of the appropriations which will be necessary in order to set up and maintain an adequate reserve to provide a fund sufficient to protect the State, its departments, institutions, and agencies from loss or damage to any of said properties up to fifty per centum (50%) of the value thereof. Appropriations made for the creating of such fire insurance reserves against property of the Department of Agriculture, or the Board of Transportation or any special operating fund shall be charged against the funds of such departments.

The State property fire insurance fund is authorized and empowered to pay all the administrative expenses occasioned by the administration of Article 21 of Chapter 58 of the General Statutes. (1945, c. 1027, s. 2; 1957, c. 65, s. 11; 1959, c. 182, s. 1; 1973, c. 507, s. 5.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transporta-

tion" for "State Highway Commission" in the second sentence of the first paragraph.

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-195.2. Credit life insurance defined.

Public Policy. — The long established public policy of this State prevents one who lacks a legally recognized insurable interest in the life of another from taking out and enforcing for his own benefit a policy of insurance on such other person's life. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Creditor has an insurable interest in debtor's life. *Hatley v. Johnston*, 265 N.C. 73, 143 S.E.2d 260 (1965).

Credit life insurance, as between the creditor and insured debtor, is collateral security. *Hatley v. Johnston*, 265 N.C. 73, 143 S.E.2d 260 (1965).

Credit life insurance, as between the creditor and insured debtor, is collateral security. Consequently, payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

As between the creditor and the insured debtor the credit life insurance is collateral security, but this does not place the defendant insurance company in the position of a surety or in any sense render it secondarily liable on the debt. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Credit life insurance, as between the creditor and the insured debtor, is collateral security, but this does not place the

insurance company in the position of a surety or in any sense render it secondarily liable on the debt, the insurance company becoming liable solely because, for a premium paid to it, it assumed the risk of the debtor's continued life and his death occurs while the insurance policy is in effect. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Payment by Such Insurance Is Payment by Debtor. — Payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. The presence of an assuming grantee, who has no right to change the beneficiary under the policy, and therefore no claim of ownership, should not alter that result. *Hatley v. Johnston*, 265 N.C. 73, 143 S.E.2d 260 (1965).

When Liability Established. — Liability of the insurer under a credit life insurance policy is established at the moment of the insured debtor's death, and payment thereafter of the debt to the creditor, thereby terminating the creditor's insurable interest in the life of the debtor, does not terminate the insurer's liability under its policy of insurance. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Insurer is liable upon its policy of credit life insurance where the creditor repossesses the mortgaged chattel subsequent

to the insured debtor's death, notwithstanding the policy provided that it should terminate automatically upon repossession of the chattel, since insurer's liability under the policy became fixed when the debtor died before repossession of the chattel occurred. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Beneficiary May Sue to Enforce Terms of Contract.—North Carolina has long recognized the right of one for whose benefit a contract has been made to sue to enforce its terms, even though he is not directly a party to the contract. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Action by Debtor's Administratrix to Recover Policy Proceeds. — The fact that the insured debtor's estate is not named directly as beneficiary in a credit life insurance policy is no bar to the right of the insured's administratrix to maintain an action upon the policy, since one for whose benefit a contract has been made may sue to enforce its terms even though he is not directly a party to the contract, the credit life insurance being for the benefit of insured's estate in that the proceeds of the policy are, by contractual and statutory provision, to be applied to discharge an indebtedness of the estate. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

When the debt to the creditor is satisfied subsequent to the insured debtor's death by repossession of the mortgaged chattel, the debtor's estate becomes subrogated to the rights of the creditor as beneficiary under the credit life insurance policy as against the insurer, and the debtor's administratrix may maintain an action

against the insurer to recover the proceeds of the policy. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Payment of Indebtedness After Debtor's Death.—When a creditor named as beneficiary of a credit life insurance policy effects payment of its indebtedness after the death of the insured debtor by repossessing the chattel purchased by the debtor under a conditional sales contract, thereby giving up its rights in the proceeds of the policy, the credit life insurance policy becomes one for the benefit of the insured collectible by his executors or administrators. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

The creditor who is named as beneficiary loses all interest in the proceeds of the policy upon payment of the indebtedness, and the policy then becomes one for the benefit of the insured, collectible by his executors or administrators. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Repossession of Chattel After Debtor's Death. — Creditor relinquished its rights in the proceeds of a credit life insurance policy when, following the death of the insured debtor, it effected payment of its indebtedness by repossession of the chattel purchased by debtor under a conditional sales contract, and the creditor could not thereafter collect and retain for its own account the proceeds of the credit life insurance policy since it no longer had an insurable interest in the life of the debtor. *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

§ 58-204. Insurable interest as between stockholders, partners, etc.—Where two or more persons have heretofore contracted or hereafter contract with one another for the purchase, at the death of one, by the survivor or survivors, of the stock, share or interest of the deceased in any corporation, partnership or business association of any kind, the person or persons making the contract of purchase shall be deemed to have, and are hereby declared to have, an insurable interest in the life or lives of the person or persons contracting to sell. (1941, c. 201; 1969, c. 751, s. 44.)

Editor's Note. — The 1969 amendment, effective Oct. 1, 1969, deleted "own stock or interests in the same corporation, partnership or business association and" follow-

ing "persons" near the beginning of the section and inserted "in any corporation, partnership or business association of any kind" near the middle of the section.

§ 58-205. Rights of beneficiaries.

Section 58-206 is actually an amendment of this section. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Section 58-206 supersedes this section where there are variations or conflicts. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

§ 58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder.—All minors in North Carolina of the age of 15 years and upwards shall have full power and authority to make contracts of insurance or annuity with any life insurance company authorized to do business in the State of North Carolina, either domestic or foreign, and to exercise all the powers, rights, and privileges of ownership conferred upon them under the terms of any and all such contracts applied for by and issued to them, and with full power to surrender, assign, modify, pledge, or change such contracts, and to receive any dividends thereon and generally to have the full power and authority in the premises that persons 18 years and upwards could and would have relative to any and all such contracts. (1945, c. 379; 1947, c. 721; 1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" near the end of the section.

Stated in *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.

Constitutionality.—This section exempts the cash surrender values of policies of life insurance in which the "wife and/or children" of the insured (bankrupt) are designated beneficiaries, and N.C. Const., Art. X, § 5, does not conflict with and nullify this section in those instances where the "wife and/or children" are designated beneficiaries but on the contrary is in accord therewith. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

North Carolina Const., Art. X, § 5, was adopted for the express purpose of protecting insurance for wives and children from creditors during the life of the insured. The intent of the General Assembly and of the electorate would be thwarted if § 5 were construed as providing a lesser benefit than that provided by this section for the "wife and/or children." *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

Section Amendatory of § 58-205.—

This section is actually an amendment of § 58-205. In *re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

The significance of this section is to be considered in the light of the general rule of statutory construction that where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the legislature is made clear. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

"Proceeds" or "Proceeds and Avails."—The words "proceeds" or "proceeds and

avails" when used in life insurance exemption statutes comprehend the protection of cash surrender values and other values built up during the life of the policies as well as the death benefits. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

This section supersedes § 58-205 where there are variations or conflicts. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

Cash Surrender Value Exempt.—The cash surrender value of a policy of life insurance is exempt from the claims of the trustee in bankruptcy of the insured even though the right to change the beneficiary is reserved. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970). But see *In re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

A trustee in bankruptcy is not entitled to the cash surrender value of a life insurance policy in which the wife is the named beneficiary notwithstanding the insured (bankrupt) has reserved the right to change the beneficiary. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970). But see *In re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

The cash surrender value of a life insurance policy issued on the life of a bankrupt for the benefit of his wife, with the bankrupt reserving the right to change the beneficiary, is not an asset of the bankrupt's estate and is therefore exempt from the claims of the trustee in bankruptcy. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970). But see *In re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Unquestionably, under this section, considered alone, the "proceeds and avails," including the cash surrender value, of a policy in which the wife is named as beneficiary, are exempt from the claims of the trustee in bankruptcy, "whether or not the right to change the beneficiary is reserved or permitted." *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970). But see *In re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Wives and children of bankrupts are protected from claims of the bankrupt's credi-

tors, both during his life and at his death, if life policies are for their sole benefit. *In re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Third Party Beneficiaries Protected.—The protection afforded by this section is not limited to any particular class of beneficiaries. It relates to a policy on the life of the insured payable to any third-party beneficiary. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

§ 58-207. Notice of nonpayment of premium required before forfeiture.

Notice Is Prerequisite to Forfeiture Unless Premiums Are Payable Monthly.—Notice that any premium or premiums are in default is a prerequisite to forfeiture of

the policy under this section except as to policies on which premiums are payable monthly. *Wiles v. Nationwide Life Ins. Co.*, 334 F.2d 296 (4th Cir. 1964).

§ 58-210. Group life insurance defined.—No policy of group life insurance shall be delivered in this State unless it conforms to one of the following descriptions:

- (1) A policy issued to an employer, or to the trustee of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer subject to the following requirements:

- a. The employees eligible for insurance under the policy shall be all of the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract, or otherwise. The policy may provide that the term "employees" shall include the individual proprietor or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include retired employees. The term "employer" as used herein may be deemed to include any county, municipality, or the proper officers, as such, of any unincorporated municipality or any department, division, agency, instrumentality or subdivision of a county, unincorporated municipality or municipality. In all cases where counties, municipalities or unincorporated municipalities or any officer, agent, division, subdivision or agency of the same have heretofore entered into contracts and purchased group life insurance for their employees, such transactions, contracts and insurance and the purchase of the same is hereby approved, authorized and validated.
- b. The premium for the policy shall be paid by the policyholder, either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. No policy may be issued on which the entire premium is to be derived from funds con-

tributed by the insured employees. A policy on which part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least seventy-five percent (75%) of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

- c. The policy must cover at least 10 employees at date of issue.
 - d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employees or by the employer or trustee. No policy may be issued which provides insurance on any employee which together with any other insurance under any group life insurance policy or policies issued to the employer or to the trustee of a fund established in whole or in part by the employer exceeds one hundred thousand dollars (\$100,000), except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.
- (2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:
- a. The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract or otherwise.
 - b. The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors or identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless at least seventy-five percent (75%) of the then eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.
 - c. The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than seventy-five percent (75%) of the new entrants become insured.

- d. The amount of life insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in installments to the creditor, or ten thousand dollars (\$10,000), whichever is less.
 - e. The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.
- (3) A policy issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons other than the union or any of its officials, representatives or agents, subject to the following requirements:
- a. The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the union, or both.
 - b. The premium for the policy shall be paid by the policyholder, either wholly from the union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five percent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.
 - c. The policy must cover at least 25 members at date of issue.
 - d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the union. No policy may be issued which provides insurance on any union member which together with any other insurance under any group life insurance policies, issued to the union exceeds one hundred thousand dollars (\$100,000).
- (4) A policy issued to the trustee of a fund established by two or more employers in the same industry or kind of business or by two or more labor unions, which trustee shall be deemed the policyholder, to insure employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following requirements:
- a. The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to memberships in the unions, or to both. The policy may provide that the term "employees" shall include the individual proprietor or partners if an employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include the trustee or the employees of the trustee, or both, if their duties are

principally connected with such trusteeship. The policy may provide that the term "employees" shall include retired employees.

- b. The premium for the policy shall be paid by the trustee wholly from funds contributed by the employers of the insured persons. The policy must insure all eligible persons, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.
- c. The policy must cover at least 100 persons at date of issue.
- d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions. No policy may be issued which provides insurance on any person, which together with any other insurance under any group life insurance policy or policies issued to the employers, or any of them, or to the trustee of a fund established in whole or in part by the employers, or any of them, exceeds one hundred thousand dollars (\$100,000), except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(5) A policy issued to an association of persons having a common professional or business interest, which association shall be deemed the policyholder, to insure members of such association for the benefit of persons other than the association or any of its officials, representatives or agents, subject to the following requirements:

- a. Such association shall have had an active existence for at least two years immediately preceding the purchase of such insurance, was formed for purposes other than procuring insurance and does not derive its funds principally from contributions of insured members toward the payment of premiums for the insurance.
- b. The members eligible for insurance under the policy shall be all of the members of the association or all of any class or classes thereof determined by conditions pertaining to their employment, or the membership in the association, or both. The policy may provide that the term "members" shall include the employees of members, if their duties are principally connected with the member's business or profession.
- c. The premium for the policy shall be paid by the policyholder, either wholly from the association's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance, nor if the Commissioner finds that the rate of such contributions will exceed the maximum rate customarily charged employees insured under like group life insurance policies issued in accordance with the provisions of subdivision (1). A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five percent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance

must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

- d. The policy must cover at least 25 members at date of issue.
- e. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the association. No policy may be issued which provides insurance on any member which together with any other insurance under any group life insurance policies issued to the association exceeds one hundred thousand dollars (\$100,000).

(1965, c. 869; 1971, c. 516; 1973, c. 249.)

Editor's Note.—

The 1965 amendment substituted "\$50,000" for "\$40,000" in paragraph d of subdivisions (1), (3) and (4), and in paragraph e of subdivision (5).

The 1971 amendment substituted "one hundred thousand dollars (\$100,000)" for "\$50,000" in the last sentence of paragraph (d) of subdivisions (1), (3), and (4), and in the last sentence of paragraph (e) of subdivision (5).

The 1973 amendment inserted "life" preceding "insurance" and substituted "ten thousand dollars (\$10,000)" for "\$5,000" in paragraph d of subdivision (2).

Only the introductory paragraph and the subdivisions affected by the amendments are set out.

Inapplicability of Statutory Limit on Amount of Group Life Insurance. — See opinion of Attorney General to Mr. A.C. Barefoot, Jr., Chairman, Teachers' and State Employees' Benefits Study Commission, 40 N.C.A.G. 631 (1970).

Quoted in *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Cited in *Clayton v. Prudential Ins. Co. of America*, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

§ 58-211. Group life insurance standard provisions.

This section relates to a policy of life insurance delivered in this State. *Clayton v. Prudential Ins. Co. of America*, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

Cited in *Congr v. Travelers Ins. Co.*,

266 N.C. 496, 146 S.E.2d 462 (1966); *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

§ 58-211.3. Assignment of interest in group policies and annuity contracts.—Any individual insured under a group insurance policy or group annuity contract shall have the right, unless expressly prohibited under the terms of the policy or contract of insurance, to assign to any other person his rights and benefits under the policy or contract, including, but not limited to the right to designate the beneficiary or beneficiaries and the right of conversion guaranteed by G.S. 58-211, and, subject to the provisions of the policy relating to assignments thereunder, any such assignment, made either before or after April 28, 1969, shall be valid for the purpose of vesting in the assignee all such rights and benefits so assigned. (1969, c. 319.)

ARTICLE 24.

Mutual Burial Associations.

§ 58-224.1. North Carolina Mutual Burial Association Commission; membership; election; duties.—There is hereby created the North Carolina Mutual Burial Association Commission to be composed of five members.

- (1) **Initial Commission.**—The members of the initial Commission shall be elected and chosen as follows:

- a. The North Carolina Burial Association Commissioner, the president and vice-president of the North Carolina Funeral Directors Association shall unanimously select the names of four persons who are members of said association and are mutual burial as-

sociation officers. The four names so selected shall be printed on a ballot by the Commissioner and one ballot mailed to each burial association operator in the State who is or would be eligible to join said association. No burial association operator shall be entitled to more than one ballot. Each operator shall vote for two names on the ballot and shall return the ballot by posting same in the mail on or before November 15, 1967, to the Burial Association Commissioner. The two persons receiving the highest number of votes shall be deemed elected to the Commission. The person receiving the highest number of votes shall serve for a term of five years and the person receiving the second highest number of votes shall serve for two years. If less than two or more than two persons are voted for, the ballot shall be void. The names of persons may be "written in" on the ballot. In case of a tie, the winner shall be chosen by lot, unless the two persons receiving the greatest number of votes tie, in which case both shall be deemed elected and the person to serve the five-year term on the Commission shall be chosen by lot.

- b. The North Carolina Burial Association Commissioner, the president and vice-president of the Funeral Directors and Morticians Association of North Carolina shall unanimously select the names of two persons who are members of said association and are mutual burial association officers. The names of the two persons so selected shall be printed on a ballot by the Commissioner and one ballot mailed by him to each burial association operator in the State who is or would be eligible to join said association. No burial association operator shall be entitled to more than one vote. Each operator shall vote for one name on the ballot and shall return the ballot by mail by posting same on or before November 15, 1967, to the Burial Association Commissioner. The person receiving the highest number of votes shall be deemed elected to the Commission and shall serve for a term of four years. The name of a person may be "written in" on a ballot. In case of a tie vote, the winner shall be selected by lot.
- c. The North Carolina Burial Association Commissioner, the president and vice-president of the North Carolina Perpetual Care Cemetery Association shall unanimously select the names of two persons who are members of said association and are perpetual care cemetery operators. The names of the two persons so selected shall be printed on a ballot by the Commissioner and one ballot mailed by him to each perpetual care cemetery operator in the State. Each operator shall vote for one name on the ballot and shall return the ballot by mail to the Commissioner by posting same on or before November 15, 1967. No operator shall be entitled to more than one vote. The name of a person may be "written in" on a ballot. The person receiving the highest number of votes shall be deemed elected to the Commission and shall serve for a term of one year. In case of a tie, the winner shall be selected by lot.
- d. One member of the Commission shall be a citizen of North Carolina, who is a member of a mutual burial association authorized by this article. He shall be appointed by the Governor and shall serve for a term of three years.
- e. In the event of a vacancy on the initial Commission by resignation, death, or otherwise, a successor to serve for the unexpired term

shall be chosen within 90 days of the occurrence of the vacancy in the same manner as that used to elect or appoint the member of the Commission whose seat is vacant.

- f. At any time between November 20, 1967 and November 25, 1967, the Burial Association Commissioner, at his office in Raleigh, shall, in the presence of the president of the North Carolina Funeral Directors Association, the president of the Funeral Directors and Morticians Association of North Carolina, and the president of the North Carolina Perpetual Care Cemetery Association, or any person by them designated in their stead, open and tabulate all ballots received pursuant to this section. The results of the election shall be mailed to any person requesting same and shall be published in at least three newspapers having, in the opinion of the Commissioner, general circulation in the area they serve.
 - g. All initial members of the Commission shall take office on the first Monday in December 1967, and shall serve until their successors are elected or appointed (as the case may be) and qualified.
- (2) After the terms of the initial members of the Commission or their successors to serve unexpired terms, have expired, all five members of the Commission shall serve for a term of five years and shall be elected or appointed, as the case may be, as follows:
- a. At least 90 days prior to the expiration of the term of the Commission member who was elected pursuant to the provisions of subdivision (1) a or (1) e, the persons who were eligible to vote under the provisions of subdivision (1) a shall nominate and elect a successor, under such rules and regulations as they shall determine, as approved by the North Carolina Burial Commission, provided that all mutual burial association operators shall be entitled to vote. The person so elected shall be certified to the Burial Association Commissioner by the president of the North Carolina Funeral Directors Association as qualifying under the requirements of subdivision (1) a.
 - b. At least 90 days prior to the expiration of the term of the Commission member who was elected pursuant to the provisions of subdivision (1) b or (1) e, the persons who were eligible to vote under the provisions of subdivision (1) b shall nominate and elect a successor, under such rules and regulations as they shall determine; as approved by the North Carolina Burial Commission, provided that all mutual burial operators shall be entitled to vote. The person so elected shall be certified to the Burial Association Commissioner by the president of the Funeral Directors and Morticians Association of North Carolina as qualifying under the requirement of subdivision (1) b.
 - c. At least 90 days prior to the expiration of the term of the Commission member who was elected pursuant to the provisions of subdivision (1) c or (1) e, the persons who were eligible to vote under the provisions of subdivision (1) c shall nominate and elect a successor under such rules and regulations as they shall determine; as approved by the North Carolina Burial Commission, provided that, all perpetual care cemetery operators in North Carolina shall be entitled to vote. The person so elected shall be certified to the Burial Association Commissioner by the president of the North Carolina Perpetual Care Cemetery

Association as qualifying under the requirements of subdivision (1) c.

- d. In the event that any association, entitled by the provisions of this article to representation on the North Carolina Mutual Burial Association Commission, shall fail to select by November 1 of the year of the expiring term, persons for the election to membership on the Commission, the Commissioner may declare the seat vacant and appoint, from the appropriate association, any person or persons to serve the term of the vacant seat(s).
- e. Any vacancy on the Commission, other than on the initial Commission, as provided in subdivision (1) e, shall be filled by election, or by appointment of the Governor, as the case may be, such election or appointment to be for the unexpired term.
- f. Other than the initial Commission, no member may be elected for two successive terms.

- (3) All members of the Commission, before assuming the duties of their office, shall take an oath for the faithful performance of their duties. (1967, c. 1197, s. 1.)

State Government Reorganization.—The Department of Commerce by § 143A-184, Burial Commission was transferred to the enacted by Session Laws 1971, c. 864.

§ 58-224.2. Duties of Commission; meetings; Burial Commissioner; secretary.—It shall be the duty of the North Carolina Mutual Burial Commission to supervise, pursuant to this Article, all burial associations authorized by this Article to operate in North Carolina, to determine that such associations are operated in conformity with this Article and pursuant to the rules and regulations of the Commission adopted pursuant to this Article; to assist the Commissioner with prosecution of violations of this Article or rules and regulations adopted pursuant thereto; to counsel with and advise the Burial Association Commissioner in the performance of his duties and to protect the interests of members of mutual burial associations.

The Burial Association Commissioner, with the consent of the Commission, and after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits in cash or merchandise and services from the official funeral director of the member's association to the official funeral director of any other mutual burial association in good standing under the provisions of this Article.

The Commission shall elect its own chairman, who shall vote only when the Commission is evenly divided.

The Commission shall hold regular meetings at least twice each year, and more often if called by the Commissioner, in Raleigh, or such place in North Carolina as the Commissioner may direct. Special meetings of the Commission may also be called in Raleigh, or such other place in North Carolina as they may direct, by a majority of the Commission.

The Burial Association Commissioner shall serve as secretary of the Commission and shall keep minutes of all regular and special meetings.

All regular or special meetings of the Commission, unless a majority of the members of the Commission vote otherwise, shall be open to the public. All regular meetings shall be advertised in at least three newspapers having inter-county circulation in North Carolina.

Members of the Commission shall receive, when attending such regular or special meetings, such per diem, expense allowance and travel allowance as are allowed other commissions and boards of the State. The legal adviser to the Com-

mission shall be entitled to actual expenses when attending regular or special meetings of the Commission held other than in Raleigh. All expenses of the Commission shall be paid from funds coming to the Commissioner pursuant to this Article. (1967, c. 1197, s. 2; 1971, c. 1151.)

Editor's Note. — The 1971 amendment inserted "cash or" in the second sentence of the second paragraph.

Burial Commissioner was transferred to the Department of Commerce by § 143A-183, enacted by Session Laws 1971, c. 864.

State Government Reorganization.—The

§ 58-225: Repealed by Session Laws 1967, c. 1197, s. 3.

§ 58-226. **Requirements as to rules and bylaws.**—All burial associations now operating within the State of North Carolina, and all burial associations hereafter organized and operating within the State of North Carolina shall have and maintain rules and bylaws embodying the following:

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of any association already organized, shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which benefit shall consist of a funeral in merchandise and service, with no free embalming or free ambulance service included in such benefits. No other free service or any other thing free shall be held out, promised or furnished, in any case. Such funeral benefit shall be in the amount of one hundred dollars (\$100.00) of merchandise and service, without free embalming or free ambulance service, for persons of the age of 10 years and over, or in the amount of fifty dollars (\$50.00) for persons under the age of 10 years; provided, however, that any member of any association may purchase a double benefit (for a total benefit of two hundred dollars (\$200.00)); however, any additional benefit shall be based on the assessment rate, as provided in article 6 of this section, at the attained age of applicant at the time the double benefit takes effect. The purchase of a double benefit shall not be available to any member who cannot fulfill the requirements as set forth in article 3 of this section, excluding the payment of the twenty-five cents (25¢) membership fee. Any funeral director who sells or promotes the sale of a membership shall provide a funeral at a cost of the face amount of the policy, or give credit in the amount of the face value on such funeral as may be selected by the family of the member of the association.

Article 4. The annual meeting of the association shall be held at (here insert the place, date and hour); each member shall have one vote at said annual meeting and fifteen members of the association shall constitute a quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and bylaws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-

treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these articles and the bylaws of the association, and subject to such modification as may be made or authorized by an act of the General Assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the Burial Association Commissioner or his duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up-to-date so that the financial standing of the association may be readily ascertained by the Burial Association Commissioner or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the Burial Association Commissioner to take charge of the books of the association and do whatever work is necessary to bring the books up-to-date. The actual costs of said work may be charged the burial association and shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Whenever in the opinion of the Burial Association Commissioner, it is necessary to audit the books of any burial association more than three times in any calendar year, the Burial Association Commission shall have authority to assess such burial association the actual cost of any audit in excess of three per calendar year, provided that no more than three audits may be deemed necessary unless a discrepancy exists at the last regular audit. Such cost shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Every burial association shall file with the Burial Commission an annual report of its financial condition on a form furnished to it by the Burial Commissioner. Such report shall be filed on or before February 15 of each calendar year and shall cover the complete financial condition of the burial association for the immediate preceding calendar year. The Burial Association Commission may levy and collect a penalty of twenty-five dollars (\$25.00) for each day after February 15 that the report called for herein is not filed. The Commission may, in its discretion, grant any reasonable extension of the above filing date without the penalty provided in this section. Such penalty shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association. Any secretary or secretary-treasurer who fails to file such financial report on or before February 15 of each calendar year shall be guilty of a misdemeanor and shall be punished by a fine of not in excess of one hundred dollars (\$100.00) and imprisoned for not in excess of 30 days, or both fined and imprisoned. Each day after February 15 that said report is not filed by the secretary or secretary-treasurer of a burial association, shall constitute a separate offense.

Article 11. Assessments shall be made as provided in G.S. 58-237.1. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

(1967, c. 1197, s. 4; 1969, c. 1041, ss. 2, 3; 1973, c. 688.)

Editor's Note.—

The 1967 amendment substituted for the former fourth sentence in article 2 the proviso at the end of the third sentence and the present fourth and fifth sentences in the article.

The 1969 amendment substituted the present last two sentences of the first

paragraph of article 4 for the former last three sentences of that paragraph, added the second and third paragraphs of article 4 and rewrote article 11.

The 1973 amendment deleted, at the end of the first sentence of article 2, "and in no case shall any cash be paid."

As the rest of the section was not changed by the amendments, only the introductory paragraph and articles 2, 4 and 11 are set out.

§ 58-228. Assessments against associations for expenses of Burial Commissioner.—In order to meet the expenses of the supervision of the burial associations, the Burial Association Commissioner shall prorate the amount of supervisory costs over and above any other funds in his hands for this purpose and assess each association on a pro rata basis in accordance with the number of members of each association, which total assessment shall, in the aggregate, amount to eighty per centum (80%) of the total budget of the Burial Association Commissioner as approved by the Director of the Budget and the Advisory Budget Commission; provided that, said total assessment shall not exceed sixty-eight thousand dollars (\$68,000.00). Each burial association shall remit to the Burial Association Commissioner its pro rata part of the assessment, which expense shall be included in the thirty per centum (30%) expense allowance as provided in article 13 of G.S. 58-226. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within 30 days thereafter. If any association shall fail or refuse to pay such assessment within 30 days, the Burial Association Commissioner is authorized to transfer all memberships and assets of every kind and description to the nearest next association that is found by the Burial Association Commissioner to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4; 1951, c. 901, s. 1; 1955, c. 259, ss. 1, 2; 1967, c. 985, s. 1; 1969, c. 1006, s. 2.)

Editor's Note.—

The 1967 amendment rewrote the first sentence, added the second sentence, and rewrote the last sentence.

The 1969 amendment, effective July 1, 1969, increased the maximum total assessment from \$56,000 to \$68,000.

§ 58-229.3. Unclaimed funds of defunct burial association. — Any funds on deposit in any bank or other financial institution in this State in the name of any burial association that is no longer in operation and has no members shall be transferred to the office of the State Burial Commissioner for the operation of such office and the purposes provided in G.S. 58-228. (1969, c. 1083.)

§ 58-235. Free services; failure to make proper assessments, etc., made a misdemeanor.—Any person or persons who offer free funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars (\$250.00) or imprisoned for not less than 12 months, or both, in the discretion of the court. (1941, c. 130, s. 13; 1967, c. 1197, s. 5.)

Editor's Note. — The 1967 amendment rewrote this section.

§ 58-236. Right of appeal upon revocation or suspension of license.—Upon the revocation or suspension of any license or authority by Burial Association Commissioner, under any of the provisions of Article 24, the said association or individual whose license has been revoked or suspended shall have right of appeal from the action of said Burial Association Commissioner revoking or suspending such license or authority to the superior court of the county in which such burial association may be located: Provided, said association shall give notice of appeal in writing to the Burial Association Commissioner within 10 days from the date of order revoking or suspending the said license and the said association giving notice of appeal shall deposit with the Burial Association Commissioner an amount sufficient to cover appeal fees, which the Burial Associa-

tion Commissioner shall pay to the clerk of the superior court. Upon receipt of said notice of appeal, the Burial Association Commissioner shall file with the clerk of the superior court of the county in which the burial association is located the decision of the Burial Association Commissioner and the clerk of the superior court shall transfer the appeal to the civil issue docket and the same shall be heard de novo. If upon the revocation or suspension of a license of a burial association by the Burial Association Commissioner and where the burial association gives the proper notice of appeal, the burial association shall be permitted to operate until a final decision has been made by the higher court. (1941, c. 130, s. 14; 1943, c. 272, s. 4; 1957, c. 820, s. 3; 1973, c. 108, s. 20.)

Editor's Note.—

The 1973 amendment deleted "as in cases

of appeal from a justice of the peace" following "docket" in the second sentence.

§ 58-237. Bond of secretary or secretary-treasurer of burial associations.—The secretary or secretary-treasurer of each burial association shall, before entering upon the duties of his office, and for the faithful performance thereof, execute a bond payable to the Burial Commissioner as trustee for the burial association in some bonding company licensed to do business in this State, to be approved by the Burial Association Commissioner. Said bond shall be in an amount not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), in the discretion of the Commissioner, for those associations whose assets, as determined by the Commissioner's audit, are ten thousand dollars (\$10,000) or less. For those associations whose assets, as determined by the Commissioner's audit, are in excess of ten thousand dollars (\$10,000), said bond shall be in an amount of ten thousand dollars (\$10,000) plus twenty-five per centum (25%) of all assets over ten thousand dollars (\$10,000); provided however, that the bond required by this section shall not in any event exceed fifty thousand dollars (\$50,000). If any association operates a branch or subsidiary and the officers of both associations are the same, for purposes of this section, it shall be treated as one association. Any burial association, with the consent of the Burial Association Commissioner, may give a bond secured by a deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company. The bond thus given shall not be acceptable in excess of the ad valorem tax value for the current year of the real estate securing said bond. The deed of trust shall be recorded in the county or counties wherein the land lies and shall be deposited with the Burial Association Commissioner, name the Commissioner as trustee for the burial association and must constitute a first lien on the property secured by the deed of trust. Said deed of trust shall contain a description of the encumbered property by metes and bounds together with evidence by title insurance policy or by certificate of an attorney at law, certifying that said trustor is the owner of a marketable fee simple title to such lands. (1941, c. 130, s. 15; 1943, c. 272, s. 5; 1967, c. 985 s. 2.)

Editor's Note.—

The 1967 amendment rewrote the section.

§ 58-237.1. Assessments.—Every burial association now or hereinafter organized shall make 12 assessments, or their equivalent, per year per member. The Burial Commissioner shall order any association to make more than 12 assessments per year when, after notice and hearing, it shall appear to the Burial Commissioner that the death loss of any association so requires in order to protect the interest of the members. (1943, c. 272, s. 6; 1969, c. 1041, s. 1; 1971, c. 650.)

Editor's Note. — The 1969 amendment rewrote this section.

The 1971 amendment, effective July 1, 1971, rewrote this section, eliminating re-

quirements that every burial association maintain a surplus of at least three dollars per member and making other changes.

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25.

Regulation of Automobile Liability Insurance Rates.

§ 58-246. North Carolina Automobile Rate Administrative Office created; objects and functions; hearings on rates. — There is hereby created a bureau to be known as the North Carolina Automobile Rate Administrative Office which office shall be established in the Compensation Rating and Inspection Bureau of North Carolina, created under G.S. 97-102 and shall be a branch and under the management of the general manager of the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

- (4) The bureau shall have the duty and responsibility of promulgating and proposing rates for liability insurance for motor vehicles which are private passenger vehicles, taxicabs, commercial cars, and for garage liability insurance as determined by classification plans promulgated by the bureau and approved by the Commissioner. The bureau also shall have authority to maintain rules and regulations and promulgate and propose rates for automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of automobile liability insurance on private passenger cars, taxicabs and commercial cars and garage liability insurance, and such other jurisdiction over insurance rates, rating methods, classifications, classification assignments, forms, and rules and regulations as the Commissioner may by general regulation provide. The provisions of this subdivision shall not apply to motor vehicles operated under certificates of authority from the Utilities Commission, the Interstate Commerce Commission, or their successor agencies, where insurance or other proof of financial responsibility is required by law or by regulation specifically applicable to such certificated vehicles.
- (5) The bureau shall maintain and furnish to the Commissioner of Insurance on an annual basis the statistics on income derived by member companies from the investment of unearned premium reserves on automobile liability policies written in this State. Whenever the bureau has propounded a rate under this Article, it shall prepare a separate exhibit for the experience years in question showing the combined earnings realized from the investment of such unearned premium reserves on policies written in this State. The Commissioner may require further information as to such earnings and may require calculations of the bureau bearing on such earnings. (1939, c. 394, s. 1; 1945, c. 381, s. 2; 1947, cc. 1068, 1073; 1953, c. 674, s. 1; 1969, c. 1252, s. 1; 1971, c. 1115, s. 1.)

Editor's Note.—

The 1969 amendment, applicable to all private passenger automobile liability rates made on or after Sept. 1, 1969, added subdivision (5).

The 1971 amendment rewrote subdivision (4).

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" near the beginning of subdivision (5).

Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of

rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

Only the introductory paragraph of the section and the subdivisions changed by the amendments are set out.

For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C.L. Rev. 481 (1967).

Purpose, etc., of Office and of State Fire Insurance Rating Bureau Compared.—The purpose and duties of the North Carolina

Fire Insurance Rating Bureau created by § 58-125 are quite similar to the purpose and duties of the North Carolina Automobile Rate Administrative Office created by this section. The Commissioners have similar statutory guidelines in considering adjustment of fire insurance rates and adjustment of automobile bodily injury and property damage insurance rates. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

A casualty insurance company, unlike a public utility, has no monopolistic or exclusive rights. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

All competing companies are required to

issue policies at the rate fixed by a State agency as a condition of doing business in North Carolina. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Rules of Evidence.—Sections 143-317 and 143-318 are not applicable to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the rate office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

Cited in Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966).

§ 58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; Commissioner of Insurance ex officio chairman.

(c) The bureau, when created, shall adopt such rules and regulations for its orderly procedure as shall be necessary for its maintenance and operation. No such rules and regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from automobile bodily injury and property damage insurance in North Carolina during the preceding year ending December 31, 1938, and members entering such bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expense of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee. The bureau shall be empowered to subscribe for or purchase any necessary service.

(1971, c. 1115, s. 2.)

Editor's Note.—

The 1971 amendment added the last sentence in subsection (c).

Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

Only the subsection affected by the amendment is set out.

Section Is Not in Conflict with Federal Laws.—This section and § 58-248.2 are not in conflict with the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) and the Sherman Anti-Trust Act (15 U.S.C. §§ 1-7). Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C.L. Rev. 481 (1967).

Bureau Is Body Apart from State but Answerable to Commissioner.—The rating bureau is a body separate and apart from the State in that it is composed of private citizens as to its employees and governing committee, but it is also answerable to the Commissioner at every turn. If it does not give the Commissioner the answers he demands, then he is free to act in his own right and as he "sees fit." Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-248. Personnel and assistants; general manager; submission of rate proposals to Commissioner of Insurance; approval or disapproval.—In order to carry into effect the objects of this Article, the bureau members shall elect its governing committee who shall employ and fix the salaries of such personnel and assistants as are necessary, but the general manager of the Compensation Rating and Inspection Bureau of North Carolina shall be the general manager also of the North Carolina Automobile Rate Administrative Office and the Commissioner of Insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the underwriting experience of automobile liability injury and property damage insurance and the other lines of insurance referred to in this Article, and this information shall be available and for the use of the North Carolina Automobile Rate Administrative Office for the capitulation and promulgation of rates on automobile bodily injury and property damage insurance and on such other lines of insurance as are subject to the rate-making authority of the bureau. All such rates compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for approval and no such rates shall be put into effect in this State until approved by the Commissioner of Insurance and not subsequently disapproved. The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the rate-making formula to arrive at a fair and equitable rate.

In determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry. The bureau in promulgating and fixing rates shall consider the same factors and shall prepare and present such information, data, indexes and exhibits with rate filings.

The Commissioner shall approve proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. Proposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit.

On or before July 1 of each calendar year the North Carolina Automobile Rate Administrative Office shall submit to the Commissioner the data hereinabove referred to for bodily injury and property damage insurance on private passenger vehicles and a rate review based on such data. Such rate proposals shall be approved or disapproved by the Commissioner in writing within 90 days after submission to him: Provided, the Commissioner shall have at least 30 days after the completion of hearings and the receipt of any additional data requested from the North Carolina Automobile Rate Administrative Office in which to consider the rate proposals.

The provisions of G.S. 58-246 to G.S. 58-248 shall not apply to publicly owned vehicles except ambulances and rescue squad vehicles which are owned and op-

erated by a county or municipality. (1939, c. 394, s. 3; 1945, c. 381, s. 2; 1965, c. 943; 1969, c. 744, s. 1; c. 1252, s. 2; 1971, c. 1115, s. 3.)

Editor's Note.—

The 1965 amendment, effective Jan. 1, 1966, deleted a former proviso at the end of the first paragraph and reinstated it as the present fifth paragraph. It also added the present third paragraph.

The first 1969 amendment added to the last paragraph the exception as to ambulances and rescue squad vehicles.

The second 1969 amendment, applicable to all private passenger automobile liability rates made on or after Sept. 1, 1969, added the last two sentences in the first paragraph of the section as set out above. The amendatory act directed that the two sentences be added "at the end of the paragraph," without specifying the paragraph intended.

The 1971 amendment, in the first sentence of the first paragraph, substituted "this Article" for "§§ 58-246 to 58-248," deleted "immediately" preceding "elect," substituted "underwriting experience of automobile liability injury and property damage insurance and the other lines of insurance referred to in this Article" for "pure cost and expense loading of automobile bodily injury and property damage insurance in North Carolina," and added "and on such other lines of insurance as are subject to the rate-making authority of the bureau." The amendment also inserted "and investments from loss reserves" in the third sentence of the first paragraph, and added the second and third paragraphs.

Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the next-to-last sentence of the first paragraph.

For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C.L. Rev. 481 (1967).

Companies to Furnish Data.—This section contemplates that each company furnish data based on North Carolina experience with reference to the items composing "expense loading" as well as those composing "pure cost." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Power of Commissioner to Fix Rates.—

The only power the Commissioner has to fix rates is such power as the General Assembly has delegated to and vested in him. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Fixing Future Rates Is Legislative

Power.—The power to fix rates effective from a specified future date, which this section purports to delegate to the Commissioner, is a legislative power, and this is no less true because its exercise is preceded by investigations and hearings. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Increase of Automobile Insurance Rates

Upheld.—Though information which was more current might have been available to the Commissioner, the record supported a conclusion that automobile insurance rates should be increased and that substantial justice had been done to all parties concerned: affected insurance companies and the consuming public. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 18 N.C. App. 23, 195 S.E.2d 572 (1973).

When Proposed Rates Proper for Future

Use.—Proposed rates will be proper for future use in North Carolina if they provide for anticipated losses, loss adjustment expenses, and other expenses of the companies attributable to that line of insurance business and include in the formula an amount which would provide for a fair and reasonable underwriting profit to the companies. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

Casualty Insurance Premium Components.

— For rate-making purposes, the components of a casualty insurance premium are the "pure premium" and "expense loading." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

"Pure Premium" Defined.— The "pure premium" is the amount allocated for the settlement of casualty losses, including loss adjustment expenses. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

"Expense Loading" Defined.—"Expense loading" is the amount allocated for operating expenses and for underwriting profit and contingencies. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Rules of Evidence.—Sections 143-317 and 143-318 are not applicable to a public hearing before the Commissioner on proposals

for a general revision of insurance rates submitted by a statutory rate-making bureau such as the rate office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.1. Order of Commissioner revising improper rates, classifications and classification assignments. — Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonably, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest.

At least 15 days prior to the date set for the hearing of a rate filing under this Article, the respective rate-making staffs of the bureau and the Commissioner shall meet at a prehearing meeting to review the filing and to discuss any points of disagreement which are likely to be in issue at the hearing. Any calls for additional information may be made at such time. The minutes of such meeting shall be made and shall be reduced to writing and shall become a part of the hearing record. Any agreements reached as to preliminary matters shall be set forth in writing and shall be consented to by counsel for the bureau, and the Commissioner. The purpose of the prehearing meeting shall be to avoid unnecessary delay in the rate hearings. (1945, c. 381, s. 2; 1971, c. 1115, s. 4.)

Editor's Note. — The 1971 amendment added the second paragraph.

Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

Commissioner's Power to Fix Rates. — The only power the Commissioner has to fix rates is such power as the General Assembly has delegated to and vested in him. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

It is the duty of the Commissioner to hold hearings prior to revising rates, and this is a two-edged sword. Not only may the voluntary members of the rating bureau present their contentions, but the independents may likewise present their contentions. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.2. Insurance policy must conform to rates, etc., filed by rating bureau; when higher rate allowed.

Section Is Not in Conflict with Federal Laws. — This section and § 58-247 are not in conflict with the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) and the Sherman Anti-Trust Act (15 U.S.C. §§ 1-7). *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

Anyone who is aggrieved can protest any determinations made by the rating bureau. This is clearly recourse outside the controls of the rating bureau, and is indeed a valuable weapon because the protest is carried to an elected official of the State who must, in turn, answer to the electorate. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

Rules of Evidence. — Sections 143-317 and 143-318 are not applicable to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the rate office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in *State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen.*, 16 N.C. App. 279, 192 S.E.2d 138 (1972).

Stated in *State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen.*, 18 N.C. App. 23, 195 S.E.2d 572 (1973).

This article is not invalid on the ground that it restricts competition by prohibiting the offering of lower premium rates than those made and filed by the rating bureau in violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1958), and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1958). Since

the rating bureau is established and administered under the active supervision of the State, it is not subject to attack under the federal antitrust laws, which condemn only private noncompetitive activities. *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966).

Now All Insurers Must Belong to Bureau and Charge Same Rates.—The 1961 amendment to this section resulted in the requirement that all insurers in this State must not only be members of the rating bureau, but that they must also charge the same uniform and minimum rates for all insurance of the same kind. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. (1965)).

Or Be Subject to Penalties.—Any insurer failing to comply with the require-

ments of this section would be subject to a revocation or suspension of its license to do business and might also be subject to criminal sanctions. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

But They May Compete by Offering Greater Dividends.—All forms of deviation from the standards set by the rating bureau are not foreclosed to insurers. On the contrary, they have the privilege of continuing to compete for customers by offering, among other things, greater dividends than other competing insurance carriers. This is the form of competition selected by the legislature as compatible with the automobile liability insurance statutes of the State. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.3. Revocation or suspension of license for violation of article.

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right.—Section 143-317(3) shows that § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as the legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.4. Punishment for violation of article.

Quoted in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.5. Review of order of Commissioner.

Quoted in *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-248.6. Appeal to Commissioner from decision of bureau.

Bureau Is Body Apart from State but Subject to Commissioner.—It is a fact that the rating bureau is a body separate and apart from the State in that it is composed of private citizens as to its employees and governing committee, but it is also answerable to the Commissioner at every turn. If it does not give the Commissioner the answers he demands then he is free to act in his own right and as he "sees fit." *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

Anyone Aggrieved Can Protest Its Determinations.—Anyone who is aggrieved can protest any determinations made by the rating bureau. This is clearly recourse outside the controls of the rating bureau, and is indeed a valuable weapon because the protest is carried to an elected official of the State who must, in turn, answer to the electorate. *Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-248.8. Rates to distinguish between safe and nonsafe drivers.—(a) The Commissioner of Insurance, in the manner prescribed by Article 25 of Subchapter V of Chapter 58 of the General Statutes, is directed to establish

a Safe Driver Reward Plan which adequately and factually distinguishes between classes of drivers having safe-driving records and those having a record of chargeable accidents, a record of convictions of major traffic violations; a record of a series of minor traffic violations; or a combination thereof; and which plan will provide for automobile property damage and bodily injury insurance premium differentials between such classes of drivers.

(b) The Commissioner of Insurance is empowered and directed to maintain a Safe Driver Reward Plan which will balance the additional premium realized from surcharges assessed against drivers having other than safe-driving records with discounts allowed to those drivers having safe driver records.

(c) Whenever any policy issued pursuant to the provisions of G.S. 20-279.21 loses the safe driver discount provided by the plan adopted pursuant to this section, or the same is surcharged due to an accumulation of points under the Safe Driver Reward Plan, the insurer shall, prior to the billing for additional premium or simultaneously therewith, inform the named insured of the surcharge or loss of discount by mailing to such insured a notice which shall state a valid basis for the surcharge or loss of discount, and which shall advise that upon receipt of a written request from the named insured it will promptly mail to the named insured a statement of the amount of increased premium attributable to the surcharge or loss of discount. Such explanation shall be privileged, and shall not constitute grounds for any cause of action against the insurer or its representatives or any firm, person, or corporation who furnishes to the insurer the information upon which its reasons are based. (1957, c. 1393, s. 11; 1961, c. 1006, s. 2; 1963, c. 1144; 1967, c. 283; 1969, c. 989, s. 1; 1971, c. 1205, s. 5.)

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, substituted "a record of convictions of major traffic violations; a record of a series of minor traffic violations; or a combination thereof" for "convictions of major traffic violations" at the end of the first paragraph and deleted the former second and third paragraphs, relating to the assignment of points for various charges or traffic violations and accidents.

The 1969 amendment added present subsection (c).

The 1971 amendment designated the

former first paragraph as subsection (a) and the former second and third paragraphs as subsection (c). The amendment also added the language at the end of subsection (a) beginning "and which plan" and added subsection (b).

Session Laws 1969, c. 989, s. 3, provides: "This act shall be effective January 1, 1970, and shall have application to any surcharging or loss of discount of automobile policies after such date."

Cited in *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966).

§ 58-248.9. The power of Commissioner to establish private passenger vehicle rate classification. — The Commissioner of Insurance is directed to establish, or cause to be established, following public hearing, such private passenger vehicle rate classifications, schedules, rules and regulations as may be deemed desirable and equitable to classify drivers of such vehicles for insurance purposes and may likewise, from time to time, withdraw, modify or amend any such classifications, schedules, rules or regulations. The Commissioner is further directed to establish a 260 Plan rate classification or an appropriate modification of that plan, in his discretion. (1971, c. 908.)

§ 58-248.10. Transfer of coverage; no rate increase for remainder of contract period permitted.—When coverage under an existing automobile liability insurance policy is transferred from one automobile to another after the approval of a rate increase by the Commissioner, the rate for the policy shall not be increased during the remainder of the contract period. Nothing contained herein shall prevent an increase in rates for a change in classification when the risk or underwriting information on a particular policyholder warrants such a change. (1973, c. 456.)

§§ 58-248.11 to 58-248.25: Reserved for future codification purposes.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.§ 58-248.26. **Definitions.**—As used in this Article:

- (1) "Cede" or "cession" means the act of transferring the profit or loss of otherwise unacceptable business (to the extent permitted in the plan of operation) from the individual insurer to all insurers through the operation of the Facility.
- (2) "Commissioner" means the Commissioner of Insurance.
- (3) "Company" means each member of the Facility.
- (4) "Eligible risk" means a person who is a resident of this State who owns a motor vehicle registered or principally garaged in this State or who has a valid driver's license in this State or who is required to file proof of financial responsibility pursuant to Article 9A or 13 of the North Carolina Motor Vehicle Code in order to register his motor vehicle or obtain a driver's license in this State; or a nonresident of this State who owns a motor vehicle registered or principally garaged in this State, or the State and its agencies and cities, counties, towns and municipal corporations in this State and their agencies, provided, however, that no person shall be deemed an eligible risk if timely payment of premium is not tendered or if there is a valid unsatisfied judgment of record against such person for recovery of amounts due for motor vehicle insurance premiums and such person has not been discharged from paying said judgment, or if such person does not furnish the information necessary to effect insurance.
- (5) "Facility" means the North Carolina Motor Vehicle Reinsurance Facility established pursuant to the provisions of this Article.
- (6) "Motor vehicle" means any motor vehicle as defined under Article 9A of Chapter 20 of the General Statutes of North Carolina.
- (7) "Motor vehicle insurance" means direct insurance against liability arising out of the ownership, operation, maintenance or use of a motor vehicle as defined in Article 9A of Chapter 20 of the General Statutes of North Carolina for bodily injury including death and property damage and includes medical payments and uninsured motorist coverages.
- (8) "Person" means every natural person, firm, partnership, association, corporation or government or agency thereof.
- (9) "Plan of operation" means the plan of operation approved pursuant to the provisions of this Article.
- (10) "Reinsurance" means that the profit or loss of otherwise unacceptable insurance risks are equitably shared by all companies. (1973, c. 818, s. 1.)

Editor's Note.—Session Laws 1973, c. 818, s. 4, provides: "This act shall become effective upon ratification; provided, however, the facility shall not be required by the Commissioner to be operational earlier

than prior to 60 days after the plan of operation has been approved and in no event later than January 1, 1974."

Session Laws 1973, c. 818, s. 3, contains a severability clause.

§ 58-248.27. **North Carolina Motor Vehicle Reinsurance Facility; creation; membership.**—There is created a nonprofit unincorporated legal entity to be known as the North Carolina Reinsurance Facility consisting of all insurers licensed to write and engaged in writing within this State motor vehicle insurance or any component thereof. Every such insurer, as a prerequisite to further engaging in writing such insurance in this State, shall be a member of the Facility and shall be bound by the rules of operation thereof as provided for in this Article and as promulgated by the Board of Governors. No company may withdraw from membership in the Facility unless it ceases to write motor vehicle insurance in this State or ceases to be licensed to write such insurance. (1973, c. 818, s. 1.)

§ 58-248.28. Obligations after termination of membership. — Any company whose membership in the Facility has been terminated by withdrawal shall, nevertheless, with respect to its business prior to midnight of the effective date of such termination continue to be governed by this Article. (1973, c. 818, s. 1.)

§ 58-248.29. Insolvency.—Any unsatisfied net liability to the Facility of any insolvent member shall be assumed by and apportioned among the remaining members in the Facility in the same manner in which assessments or gain are apportioned by the Facility. The Facility shall have all rights allowed by law in behalf of the remaining members against the estate or funds of such insolvent for sums due the Facility in accordance with this Article. (1973, c. 818, s. 1.)

§ 58-248.30. Merger, consolidation or cession.—When a member has been merged or consolidated into another insurer, or has ceded its entire motor vehicle liability insurance business in the State to another insurer, such company or its successor in interest shall remain liable for all obligations hereunder and such company and its successor in interest and the other insurers with which it has been merged or consolidated shall continue to participate in the Facility according to the rules of operation. (1973, c. 818, s. 1.)

§ 58-248.31. General obligations of insurers.—Except as otherwise provided in this Article all insurers as a prerequisite to the further engaging in this State in the writing of motor vehicle insurance or any component thereof shall accept and insure any otherwise unacceptable applicant therefor who is an eligible risk if cession of the particular coverage and coverage limits applied for are permitted in the Facility. All such insurers shall equitably share the results of such otherwise unacceptable business through the Facility and shall be bound by the acts of their agents in accordance with the provisions of this Article. No insurer shall impose upon any of its agents, solely on account of ceded business received from such agents, any quota or matching requirement for any other insurance as a condition for further acceptance of ceded business from such agents. (1973, c. 818, s. 1.)

§ 58-248.32. General obligations of agents.—Except as otherwise provided in this Article, no licensed agent of an insurer authorized to solicit and accept premiums for motor vehicle insurance or any component thereof by the company he represents shall refuse on behalf of said company to accept any application from an eligible risk for such insurance and to immediately bind the coverage applied for and for a period of not less than six months if cession of the particular coverage and coverage limits applied for are permitted in the Facility, provided the application is submitted during the agent's normal business hours, at his customary place of business and in accordance with the agent's customary practices and procedures. The commission paid on the insurance coverages provided in this Article shall not be less than the commission on insurance coverage written through the North Carolina Insurance Plan on May 1, 1973. The same commission shall apply uniformly statewide. (1973, c. 818, s. 1.)

§ 58-248.33. The Facility; functions; administration. — (a) The operation of the Facility shall assure the availability of motor vehicle insurance to any eligible risk by means of reinsurance and the Facility shall accept for transfer to the account of all members, the profit or loss of the business ceded in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either.

(b) The Facility shall reinsure for each coverage available therein to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the plan of operation as follows:

- (1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:

- a. Bodily injury liability: twenty-five thousand dollars (\$25,000) each person, fifty thousand dollars (\$50,000) each accident;
- b. Property damage liability: ten thousand dollars (\$10,000) each accident;
- c. Medical payments: one thousand dollars (\$1,000) each person; except that this coverage shall not be available for motorcycles;
- d. Uninsured motorist: twenty-five thousand dollars (\$25,000) each person; fifty thousand dollars (\$50,000) each accident for bodily injury; five thousand dollars (\$5,000) each accident property damage (one hundred dollars (\$100.00) deductible);

(2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors if there is a substantial public demand for a coverage or coverage limit of any component of motor vehicle insurance up to the following:

Bodily injury liability: one-hundred thousand dollars (\$100,000) each person, three-hundred thousand dollars (\$300,000) each accident
Property damage liability: fifty thousand dollars (\$50,000) each accident

Medical payments: two thousand dollars (\$2,000) each person

Uninsured motorist: one-hundred thousand dollars (\$100,000) each person and each accident for bodily injury and five thousand dollars (\$5,000) for property damage (one hundred dollars (\$100.00) deductible)

Any other motor vehicle insurance required by law: In twice the amount of coverage limits required by law.

(c) The Facility shall require each member to adjust losses for ceded business fairly and efficiently in the same manner as voluntary business losses are adjusted and to effect settlement where settlement is appropriate.

(d) The Facility shall be administered by a Board of Governors. The Board of Governors shall consist of nine members having one vote each from the classifications hereinafter enumerated plus the Commissioner who shall serve ex officio without vote. Each Facility insurance company member serving on the Board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the Board at the same time. Five members of the Board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following groups: the American Insurance Association (or its successors), the American Mutual Insurance Alliance (or its successors), the National Association of Independent Insurers (or its successors), all other stock insurers not affiliated with the above groups, and all other nonstock insurers not affiliated with the above groups. The Commissioner of Insurance shall appoint four members of the Board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing motor vehicle insurance in this State. The Commissioner shall select one agent from among a list of two nominees submitted by the Independent Insurance Agents of North Carolina, Inc., and one agent from among a list of two nominees submitted by the Carolinas Association of Mutual Insurance Agents, North Carolina Division. The initial term of office of said Board members shall be two years. Following completion of initial terms, successors to the members of the original Board of Governors shall be selected to serve three years. All members of the Board of Governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy on the Board from any of the aforementioned classifications until such vacancies are filled in accordance with the provisions of this Article.

(e) The Commissioner and member companies shall provide for a Board of Governors within 30 days after May 24, 1973. If any member seat on the initial

Board of Governors is not filled in accordance with this Article within such time, then, in that event the Commissioner shall appoint natural persons from any of the classifications specified in subsection (d) of this section to serve the initial term on the Board of Governors. As soon as possible after its selection, the Commissioner shall call for the initial meeting of the Board. After the Board of Governors have been selected it shall then elect from its membership a chairman and shall then meet thereafter as often as the chairman shall require or at the request of three members of the Board of Governors. The chairman shall retain the right to vote on all issues. Five members of the Board of Governors shall constitute a quorum. The same member may not serve as chairman for more than two consecutive years.

(f) The Board of Governors shall have full power and administrative responsibility for the operation of the Facility. Such administrative responsibility shall include but not be limited to:

- (1) Proper establishment and implementation of the Facility.
- (2) Employment of a manager who shall be responsible for the continuous operation of the Facility and such other employees, officers and committees as it deems necessary.
- (3) Provision for appropriate housing and equipment to assure the efficient operation of the Facility.
- (4) Promulgation of reasonable rules and regulations for the administration and operation of the Facility and delegation to the manager of such authority as it deems necessary to insure the proper administration and operation thereof.

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:

- (1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.
- (2) To receive and record reinsurance cessions from member companies.
- (3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Facility at such intervals as are established in the plan of operation.
- (4) To contract for goods and services from others to assure the efficient operation of the Facility.
- (5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Facility.
- (6) To review the market for motor vehicle insurance throughout North Carolina to make certain that eligible risks can readily obtain such insurance and to provide in the plan of operation a reasonable means for achieving this objective. The Facility is authorized to require all companies in a fair and equitable manner who are writers of motor vehicle insurance in this State to appoint and license any fire and casualty agent duly licensed to write insurance in North Carolina, in such places where a market need has been demonstrated, to be their agent to write motor vehicle insurance. The companies and agents may enter into such agency contract as may be agreeable to both parties. If a company ceases to be a member of the Facility after appointing and licensing agents pursuant to this provision, then the Facility shall promptly require another company or companies to appoint and license such agents in these places. Notwithstanding the provisions of this subdivision, the Commissioner may review the market for motor vehicle insurance or any component thereof. After notice to and consultation with the Board of Governors, if the Commissioner finds that

reasonable facilities are not being provided to make motor vehicle insurance or any component thereof available in a particular county, then in that event, he may require the Board to provide adequate facilities in such county. If the Board fails to comply with the requirements of the Commissioner, then the Commissioner may exercise all the powers of the Facility to provide such adequate facilities. Additionally, the Commissioner may require the company or companies selected to service a particular county to pay or provide for reasonable compensation for the services of the agent appointed to represent said company or companies, and, if necessary, the Commissioner may appoint such agent.

- (7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Facility, and to require each member to furnish such statistics relative to insurance reinsured by the Facility at such times and in such form and detail as may be required.
- (8) To establish fair and reasonable procedures for the sharing among the members of profit and loss on Facility business and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. Such shares may be based on the member's premiums for voluntary business for the appropriate category of motor vehicle insurance or by any other fair and reasonable method.
- (9) To receive or distribute all sums required by the operation of the Facility.
- (10) To accept all risks submitted from the companies in accordance with this Article.
- (11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently.
- (12) To adopt and enforce all rules and to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility and is not in conflict with the other provisions of this Article.

(h) Each member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a manner and time prescribed by the Board of Governors.

(i) The Board of Governors shall fix a date for an annual meeting and shall annually meet on that date. Twenty days' notice of such meeting shall be given in writing to all members of the Board of Governors.

(j) There shall be furnished to each member an annual report of the operation of the Facility in such form and detail as may be determined by the Board of Governors.

(k) Each member shall furnish statistics in connection with insurance subject to the Facility as may be required by the Facility. Such statistics shall be furnished at such time and in such form and detail as may be required but at least will include premiums charged, expenses and losses. (1973, c. 818, s. 1.)

§ 58-248.34. Plan of operation.—(a) Within 60 days after the initial organizational meeting, the Facility shall submit to the Commissioner, for his approval, a proposed plan of operation, consistent with the provisions of this Article, which shall provide for economical, fair and nondiscriminating administration and for the prompt and efficient provision of motor vehicle insurance to eligible risks. Should no plan be submitted within the aforesaid 60-day period, then the Commissioner of Insurance shall formulate and place into effect a plan consistent with the provisions of this Article.

(b) The plan of operation, unless sooner approved in writing, shall be deemed to meet the requirements of the Article if it is not disapproved by order of the Commissioner within 30 days from the date of filing. Prior to the disapproval of all or any part of the proposed plan of operation the Commissioner shall notify the Facility in what respect the plan of operation fails to meet the specific requirements

of this Article. The Facility shall, within 30 days thereafter, submit for his approval a revised plan of operation which meets the specific requirements of this Article. In the event the Facility fails to submit a revised plan of operation which meets the specific requirements of this Article within the aforesaid 30-day period, the Commissioner of Insurance shall enter an order accordingly and shall immediately thereafter formulate and place into effect a plan consistent with the provisions of this Article.

(c) Any revision of the proposed plan of operation or any subsequent amendments to an approved plan of operation shall be subject to approval or disapproval by the Commissioner in the manner herein provided in subsection (b) with respect to the initial plan of operation.

(d) Any order of the Commissioner with respect to the plan of operation or any revision of [or] amendment thereof shall be subject to court review as provided in G.S. 58-9.3.

(e) Upon approval of the Commissioner of the plan so submitted or the promulgation of a plan deemed approved by the Commissioner, all insurance companies licensed to write motor vehicle insurance in this State or any component thereof as a prerequisite to further engaging in writing such insurance shall formally subscribe to and participate in the plan so approved.

The plan of operation shall provide for, among other matters, the establishment of necessary facilities, the management of the Facility, the preliminary assessment of all members for initial expenses necessary to commence operations, the assessment of members to defray losses and expenses, the distribution of gains, the standard amount (one hundred percent (100%) or any equitable lesser amount) of coverage afforded on eligible risks which a member company may cede to the Facility, and the procedure by which reinsurance shall be accepted by the Facility; and shall further provide that:

- (1) Members of the Board of Governors shall receive reimbursement from the Facility for their actual and necessary expenses incurred on Facility business, en route to perform Facility business, and while returning from Facility business plus a per diem allowance of twenty-five dollars (\$25.00) a day which may be waived.
- (2) In order to obtain a transfer of business to the Facility effective when the binder or policy or renewal thereof first becomes effective, the company must within 30 days of the binding or policy effective date notify the Facility of the identification of the insured, the coverage and limits afforded, classification data, and premium. The Facility shall accept risks at other times on receipt of necessary information, but such acceptance shall not be retroactive. The Facility shall accept renewal business after the member on underwriting review elects to again cede the business. (1973, c. 818, s. 1.)

§ 58-248.35. Limit on cessions.—Upon receipt by the company of a risk which it does not elect to retain, the company shall follow such procedures for ceding the risk as are established by the plan of operation; provided, however, that no company can cede to the Facility more than fifty percent (50%) of all its motor vehicle insurance business in North Carolina without specific approval of the Board of Governors. (1973, c. 818, s. 1.)

§ 58-248.36. Termination of insurance.—No member may terminate insurance to the extent that cession of a particular type of coverage and limits is available under the provisions of this Article except for the following reasons:

- (1) Nonpayment of premium when due to the insurer or producing agent.
- (2) The named insured has become a nonresident of this State and would not otherwise be entitled to insurance on submission of new application under this Article.
- (3) A member company has terminated an agency contract for reasons other

than the quality of the agent's insureds or the agent has terminated the contract and such agent represented the company in taking the original application for insurance.

- (4) When the insurance contract has been cancelled pursuant to a power of attorney given a company licensed pursuant to the provisions of G.S. 58-56. (1973, c. 818, s. 1.)

§ 58-248.37. Exemption from requirements of this Article of companies and their agents.—By reason of the limit on cessions provided in this Article, the Board of Governors may exempt a company and its agents from the requirements of this Article, insofar as new business is concerned. The Board may further exempt a company and its agents from the requirements of this Article regarding the selling and servicing a particular category of business, if the company is not qualified to service the business. (1973, c. 818, s. 1.)

§ 58-248.38. Physical damage insurance availability. — No physical damage insurer shall refuse to make physical damage coverage available to any applicant for the reason that such applicant has, or may acquire, auto liability insurance through the Facility plan as provided herein; further that no such insurer may levy a surcharge or increased rate for such physical damage coverage on the basis that such applicant has, or may acquire, auto liability insurance through the Facility plan as provided herein.

Any such insurer or representative thereof failing to comply with, or otherwise violating the provisions of this section, shall be punished as prescribed in G.S. 58-248.4 and G.S. 58-248.5. (1973, c. 818, s. 1.)

§ 58-248.39. Hearings; review.—(a) Any applicant for a policy from any carrier, any person insured under such a policy, any member of the Facility and any agent duly licensed to write motor vehicle insurance, may request a formal hearing and ruling by the Board of Governors of the Facility on any alleged violation of or failure to comply with the plan of operation or the provisions of this Article or any alleged improper act or ruling of the Facility directly affecting him as to coverage or premium or in the case of a member directly affecting its assessment, and in the case of an agent, any matter affecting his appointment to a carrier or his account therewith. The request for hearing must be made within 15 days after the date of the alleged violation or improper act or ruling. The hearing shall be held within 15 days after the receipt of the request. The hearing may be held by any panel of the Board of Governors consisting of not less than three members thereof, and the ruling of a majority of the panel shall be deemed to be the formal ruling of the Board, unless the full Board on its own motion shall modify or rescind the action of the panel.

(b) Any formal ruling by the Board of Governors may be appealed to the Commissioner by filing notice of appeal with the Facility and Commissioner within 30 days after issuance of the ruling.

(c) The Commissioner shall issue an order approving the action or decision, disapproving the action or decision, or directing the Board of Governors to reconsider the ruling.

(d) Any aggrieved person or organization, any member of the Facility or the Facility may request a public hearing and ruling by the Commissioner on the provisions of the plan of operation, rules, regulations or policy forms approved by the Commissioner. The request for hearing shall specify the matter or matters to be considered. The hearing shall be held within 30 days after receipt of the request. The Commissioner shall give public notice of the hearing and the matter or matters to be considered not less than 15 days in advance of the hearing date.

(e) In any hearing held pursuant to this section by the Board of Governors or the Commissioner, the Board or the Commissioner as the case may be, shall issue a ruling or order within 30 days after the close of the hearing.

(f) All rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-9.3. (1973, c. 818, s. 1.)

§ 58-248.40. Termination of North Carolina Automobile Insurance Plan.—The Commissioner of Insurance is authorized and directed to terminate the North Carolina Automobile Insurance Plan established pursuant to G.S. 20-279.34 when it appears to his satisfaction that the Facility herein established is fully operational and when the policies issued under the prior plan have expired. (1973, c. 818, s. 2.)

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-251.3. Policy coverage to continue as to mentally retarded or physically handicapped children.—An individual or group accident and health insurance policy, hospital service policy, or medical service plan policy, delivered or issued for delivery in this State after July 1, 1969, which provides that coverage of a dependent child shall terminate upon attainment of the limiting age for dependent children specified in the policy or contract, shall also provide in substance that attainment of such limiting age shall not operate or terminate the coverage of such child while the child is and continues to be (i) incapable of self-sustaining employment by reason of mental retardation or physical handicap; and (ii) chiefly dependent upon the policyholder or subscriber for support and maintenance: Provided, proof of such incapacity and dependency is furnished to the insurer, hospital service plan corporation, or medical service plan corporation by the policyholder or subscriber within 31 days of the child's attainment of the limiting age and subsequently as may be required by the insurer or corporation, but not more frequently than annually after the child's attainment of the limiting age. (1969, c. 745, s. 1; 1971, c. 1126, s. 1.)

Editor's Note.—The 1971 amendment inserted "or group" near the beginning of the section.

Session Laws 1969, c. 745, s. 2, and Session Laws 1971, c. 1126, s. 2, provide: "This act shall apply to medical service

plan policies and hospital service plan policies issued under the provisions of Chapter 57 as fully as the same applies to accident and health policies issued under Chapter 58 of the General Statutes."

§ 58-251.4. Policies to cover newborn infants. — Every policy of insurance and every hospital service or medical service plan as defined in Chapter 57 of the General Statutes (regardless of whether any of such policies or plans shall be defined as individual, family, group, blanket, franchise, industrial or otherwise) which provides benefits on account of any sickness, illness, or disability of any minor child or which provides benefits on account of any medical treatment or service authorized or permitted to be furnished by a hospital under the laws of this State to any minor child shall provide such benefits for such occurrences beginning with the moment of birth of such child if such birth occurs while said policy or subscriber contract with such a plan is in force.

Benefits in such insurance policies or plans shall be the same for congenital defects or anomalies as are provided for most sicknesses or illnesses suffered by minor children which are covered by said policies or plans.

No policy or plan subscriber contract shall be approved by the Commissioner of Insurance pursuant to the provisions of this Article or the provisions of Chapter 57 of the General Statutes that does not comply with the provisions of this section.

The provisions of this section shall apply both to insurers governed by the provisions of Chapter 58 of the General Statutes and to corporations governed by the provisions of Chapter 57 of the General Statutes. (1973, c. 345, ss. 1, 2.)

Editor's Note. — Session Laws 1973, c. 345, s. 3, provides: "This act shall become effective upon ratification but shall only apply to policies of insurance, and hospital

service and medical service plan subscriber contracts delivered, issued for delivery, re-issued or renewed in this State on and after July 1, 1973."

§ 58-251.5. Insurers and others to afford coverage to mentally retarded and physically handicapped children.—(a) No insurance company licensed in this State pursuant to the provisions of this Chapter and no corporation governed by the provisions of Chapter 57 of the General Statutes of North Carolina shall refuse to issue or deliver any individual or group accident and health insurance policy or hospital or medical service plan policy in this State which it is currently issuing for delivery in this State and which affords benefits or coverage for minor children of the applicant, by reason of the physical handicap or mental retardation of any minor children of the applicant; nor shall any such policy issued and delivered in this State carry a higher premium rate or charge or restrict or exclude coverage or benefits by reason of said mental retardation or physical handicap. Provided, however, such policy may exclude benefits, otherwise payable for disability, hospitalization, or medical or other therapeutic expense directly and solely attributable to such mental retardation or such physical handicap.

(b) The Commissioner of Insurance shall revoke the license of any insurer or any corporation governed by the provisions of Chapter 57 of the General Statutes of North Carolina if it fails to comply with the provisions of this section.

(c) The provisions of this section shall apply to corporations governed by the provisions of Chapter 57 of the General Statutes of North Carolina. (1973, c. 754, ss. 1, 2.)

Editor's Note.—Session Laws 1973, c. 754, s. 3, makes the act effective July 1, 1973.

ARTICLE 26A.

Joint Action to Insure Elderly.

§ 58-254.11. Joint action to insure persons 65 years of age or over and their spouses permitted; associations of insurers; individual and group policies.—Notwithstanding any other provisions of this chapter or any other law which may be inconsistent herewith, any insurer may join with one or more other insurers to plan, develop, underwrite, offer, sell and provide to or for any resident person of this State, or of another state if permitted by the laws of such other state, who is 65 years of age or over and to the spouse of such person, insurance against financial loss from accident or sickness, or both. Such insurance may also cover an employer's nonresident employees and nonresident retired employees sixty-five years of age or older and their spouses, provided such employees are regularly employed within this State or were so employed at the time of their retirement. Such insurance may be offered, issued and administered through an association of two or more insurers which association is formed for the purpose of offering, selling, issuing and administering such insurance, and may be in the form of a policy insuring a resident who is 65 years of age or older, and the spouse of such resident, if any, or in the form of a group policy insuring residents 65 years of age or older and the spouses of such residents, or in both forms. On such insurance each insurer shall be severally liable for a percentage of the risks determined under the articles of association of the association. The insurer members of such association may agree with respect to premium rates, policy provisions, commission rates and other matters within the scope of this article. Notwithstanding the provisions of G.S. 58-44, any policy providing such insurance may be executed on behalf of the insurers or the association, as the case may be, by a duly authorized person and need not be countersigned by a resident agent. (1963, c. 1125; 1965, c. 677.)

Editor's Note.—The 1965 amendment inserted the present second sentence.

ARTICLE 27.

*General Regulations.***§ 58-259.1. Age limit.**

Misrepresentation as to Age.—Where a policy provides that in the event of misrepresentation as to age, the contract will be adjusted so as to pay the amount actually due under the insured's correct age, it is generally held that this provision

relates not to the efficacy of the contract, but to the benefits due, and is not affected by an incontestable clause. *Wall v. Diamond State Life Ins. Co.*, 9 N.C. App. 231, 175 S.E.2d 602 (1970).

§ 58-259.2. Nurses' services.—No agency, institution or physician providing a service for which payment or reimbursement is required to be made under a policy governed by this Chapter shall be denied such payment or reimbursement on account of the fact that such services were rendered through a registered nurse acting under authority of rules and regulations adopted by the Board of Medical Examiners and the Board of Nursing pursuant to G.S. 90-6 and 90-162.

Nothing herein shall be construed to authorize contracting with or making payments directly to any nurse not otherwise permitted. (1973, c. 437.)

§ 58-260. Discrimination forbidden; right to choose services of optometrist, podiatrist, dentist or chiropractor.—Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this Subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited.

Whenever any policy of insurance governed by this Chapter provides for payment of or reimbursement for any service which is within the scope of practice of a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, the insured or other persons entitled to benefits under such policy shall be entitled to payment of or reimbursement for such services, whether such services be performed by a duly licensed physician or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist or a duly licensed chiropractor, notwithstanding any provision contained in such policy. Whenever any policy of insurance governed by this Chapter provides for certification of disability which is within the scope of practice of a duly licensed physician, or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, the insured or other persons entitled to benefits under such policy shall be entitled to payment of or reimbursement for such disability whether such disability be certified by a duly licensed physician, or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, notwithstanding any provisions contained in such policy. The policyholder, insured, or beneficiary shall have the right to choose the provider of such services notwithstanding any provision to the contrary in any other statute. (1913, c. 91, s. 11; C. S., s. 6488; 1965, c. 396, s. 2; c. 1169, s. 2; 1967, c. 690, s. 2; 1969, c. 679; 1973, c. 610.)

Editor's Note. — The first 1965 amendment, effective July 1, 1965, added the second paragraph Section 4 of the act provides that it shall not be construed to equate optometrists with physicians except to the extent that each must be duly licensed.

The second 1965 amendment, effective Jan. 1, 1966, inserted "or a duly licensed dentist" twice in the second paragraph. Section 4 of the act provides that the right to payment or reimbursement notwith-

standing any provision to the contrary contained in any plan or policy shall be applicable only to those plans and policies entered into, issued, or renewed after the effective date of the act, there being no legislative intent to impair or enlarge obligations under any existing contracts.

The 1967 amendment, effective July 1, 1967, inserted "or a duly licensed podiatrist" in two places in the first sentence of the second paragraph.

Session Laws 1967, c. 690, s. 4, provides:

"Nothing in this act shall be construed to equate podiatrists with physicians except to the extent that each must be duly licensed."

The 1969 amendment inserted "or a duly

licensed chiropractor" in two places in the first sentence of the second paragraph.

The 1973 amendment added the second sentence of the second paragraph.

§ 58-262. Punishment for violation.

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Section 143-317(3) shows that § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insur-

ance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and in such cases the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

ARTICLE 27A.

Health Insurance Advisory Board.

§ 58-262.1. Creation of Board.

State Government Reorganization.—The Health Insurance Advisory Board was transferred to the Department of Insur-

ance by § 143A-77, enacted by Session Laws 1971, c. 864.

§ 58-262.2. Membership of Board; appointment; terms; Commissioner of Insurance ex officio member.

- (2) The term of office of the members of said Board shall be as follows: Three public members and two industry members shall be appointed for original two-year terms commencing September 15, 1967. Two public members and two industry members shall be appointed for original four-year terms commencing September 15, 1967; thereafter, all appointments shall be for terms of four years: Provided, however, each member may continue in office into the new term until his successor is appointed. No member shall by appointment or by continuance in office serve more than two consecutive four-year terms.

(1967, c. 634, s. 1.)

Editor's Note.—The 1967 amendment rewrote subdivision (2).

As the rest of the section was not changed by the amendment, it is not set out.

Section 3, c. 634, Session Laws 1967, provides that the act shall apply to terms of office commencing Sept. 15, 1967, and thereafter.

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

ARTICLE 28.

Fraternal Orders.

§ 58-267. Meetings of governing body; principal office.—Any such society or order incorporated and organized under the laws of this State may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this State; but the principal business office of such society shall al-

ways be kept in this State. (1899, c. 54, s. 91; Rev., s. 4797; 1913, c. 46; C. S., s. 6494; 1969, c. 1279.)

Editor's Note. — The 1969 amendment deleted the former second sentence, relating to separation of races.

Quoted in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786 (W.D.N.C. 1970).

§ 58-281. Beneficiaries.

Effect of Absolute Divorce. — Although the legislature has provided in this section that absolute divorce automatically annuls the designation of a husband or wife as beneficiary in a policy issued by a fraternal

order or society, policies of that type are *sui generis*. There is no similar provision applicable to insurance policies generally. *DeVane v. Travelers Ins. Co.*, 8 N.C. App. 247, 174 S.E.2d 146 (1970).

§ 58-291. Certain societies not included.—Nothing contained in this article shall be construed to affect or apply to societies which limit their membership to any one hazardous occupation, nor to an association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars to any one person, provided, that the Commissioner of Insurance, upon investigation, may, in his discretion, authorize the payment of death benefits not exceeding fifteen hundred dollars (\$1500.00) to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this State, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The Commissioner of Insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article. (1913, c. 89, s. 26; C. S., s. 6518; 1925, c. 70, s. 2; 1967, c. 977.)

Editor's Note.—The 1967 amendment inserted the proviso that follows “five hun-

dred dollars to any one person” near the beginning of the section.

Chapter 59.

Partnership.

ARTICLE 1.

Uniform Limited Partnership Act.

§ 59-2. **Formation.**—(a) Two or more persons desiring to form a limited partnership shall

(1) Sign and swear to a certificate, which shall state

- a. The name of the partnership,
- b. The character of the business,
- c. The location of the principal place of business,
- d. The name and place of residence of each member; general and limited partners being respectively designated,
- e. The term for which the partnership is to exist,
- f. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,
- g. The additional contributions, if any, agree to be made by each limited partner and the times at which or events on the happening of which they shall be made,
- h. The time, if agreed upon, when the contribution of each limited partner is to be returned,
- i. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.
- j. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,
- k. The right, if given, of the partners to admit additional limited partners,
- l. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,
- m. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and
- n. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(2) File for record the certificate in the office of the register of deeds of the county where the principal place of business is located according to the statement in such certificate.

(b) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (a). (1941, c. 251, s. 2; 1953, c. 1190, s. 4; 1967, c. 823, s. 26.)

Cross Reference.—See Editor's note to § 53-5. 1968, substituted "register of deeds" for "clerk of the superior court" in subdivision

Editor's Note.—

The 1967 amendment, effective Jan. 1,

(2) of subsection (a).

§ 59-19. Assignment of limited partner's interest.

(e) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with G.S. 59-25.

(1971, c. 1093, s. 10.)

Editor's Note. — The 1971 amendment substituted "appropriately" for "approximately" in subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 59-25. Requirements for amendment and for cancellation of certificate.

(d) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the register of deeds in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(e) A certificate is amended or canceled when there is filed for record in the office of the register of deeds where the certificate is recorded

(1) A writing in accordance with the provisions of subsection (a), or (b) or

(2) A certified copy of the order of court in accordance with the provisions of subsection (d).

(1967, c. 823, s. 27.)

Cross Reference.—See Editor's note to § 53-5.

As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, substituted "register of deeds" for "clerk of the superior court" in subsections (d) and (e).

ARTICLE 2.*Uniform Partnership Act.***Part 2. Nature of a Partnership.****§ 59-36. Partnership defined.**

A partnership may be formed by an oral agreement. *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968).

unless some agreement to the contrary can be proved. *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968).

A partnership is a partnership at will

Part 3. Relations of Partners to Persons Dealing with the Partnership.**§ 59-39. Partner agent of partnership as to partnership business.**

Liability on Contract Signed for Partnership by Unauthorized Partner.—Where a contract apparently made for the purpose of carrying on partnership business, is executed in the partnership name by a partner, the partnership is liable for a

breach of the contract, even though the partner was not authorized to so contract unless the other parties to the contract had notice of the lack of authority. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

§ 59-45. Nature of partner's liability.

Quoted in *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

Part 4. Relations of Partners to One Another.

§ 59-52. Right to an account.

Cited in *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968).

Part 5. Property Rights of a Partner.

§ 59-55. Nature of a partner's right in specific partnership property.

Editor's Note.—For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

Part 6. Dissolution and Winding Up.

§ 59-60. Partnership not terminated by dissolution.

Stated in *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968).

§ 59-61. Causes of dissolution.

The significance of a partnership being one at will, i.e., without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to copartners who have neglected to protect themselves by an agreement to continue for a definite term. *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968).

Death of Partner.—

In the absence of an express agreement to the contrary, every partnership is dissolved by the death of one of the partners. *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

Distinction between Partnership for In-

§ 59-70. Rules for distribution.

Determination of Liabilities Is Contemplated in Receivership Proceedings.—When a partner seeks a dissolution of a partnership and, with the consent of the other partners, a receiver is appointed to take possession of partnership assets for distribution to the parties entitled thereto, the law contemplates a judicial determination of the liabilities of the partnership. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

No Distribution to Partners Until Such Determination Made.—Until the liabilities

definite Period and One for Specified Term as Concerns Dissolution. — According to the majority view, the only difference, so far as concerns the rights of dissolution by one partner, between a partnership for an indefinite period and one for a specified term is that in the case of a partnership for a definite term a dissolution before the expiration of the stipulated time is a breach of agreement which subjects such partner to a claim for damages for breach of contract if the dissolution is not justified, whereas the dissolution of a partnership at will affords the other partner no ground for complaint; in either case the action of one partner actually dissolves the partnership. *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968).

Applied in *Langdon v. Hurdle*, 17 N.C. App. 530, 195 S.E.2d 72 (1973).

of the partnership have been determined, there can be no distribution to the partners. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

When Judgment Recoverable against Individual Partners.—Where the partnership assets are insufficient to discharge the partnership obligations, claimant may, in the proceedings in which a receiver was appointed, have judgment against the individual partners for the balance of his claim. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

ARTICLE 3.

Surviving Partners.

§ 59-82. Surviving partner to account and settle.

Cited in *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

§ 59-84. Settlement otherwise provided for.

Applied in *Langdon v. Hurdle*, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

Chapter 61.

Religious Societies.

§ 61-1. Trustees may be appointed and removed.

Cited in *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 61-2. Trustees may hold property.

Member of Quasi Corporation Is Engaged in Joint Enterprise.—One of the material differences between a church or denomination, religious society or congregation (a quasi corporation) in North Carolina and a real corporation organized or existing pursuant to statutory law, is that a member of such a quasi corporation is engaged in a joint enterprise and may not recover from the quasi corporation damages sustained through the tortious conduct of another member thereof. *Goard*

v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

And May Not Recover for Negligence of Agent, Employee or Another Member.—This section does not authorize a member of a church or denomination, religious society or congregation (a quasi corporation) to recover of the quasi corporation for the negligence of an agent, employee or another member thereof. *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 61-3. Title to lands vested in trustees, or in societies.

Cited in *YWCA v. Morgan*, 281 N.C. 485, 189 S.E.2d 169 (1972).

Chapter 62.

Public Utilities.

Article 3.

Powers and Duties of Utilities Commission.

Sec.

- 62-50. Safety standards for interstate and intrastate natural gas pipelines.
62-51. To inspect books and records of corporations affiliated with public utilities.

Article 4.

Procedure before the Commission.

- 62-82. Special procedure on application for certificate for generating facility; appeal from award order.

Article 5.

Review and Enforcement of Orders.

- 62-91. Appeal docketed; title on appeal; priorities on appeal.
62-99. [Repealed.]

Article 6.

The Utility Franchise.

- 62-110.1. Certificate for construction of generating facility.
62-110.2. Electric service areas outside of municipalities.
62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.

Article 6A.

Radio Common Carriers.

- 62-119. Powers of Commission generally; definitions.

Sec.

- 62-120. Certificate of convenience and necessity required; exceptions; rules and regulations.
62-121. Issuance of certificate for carrier licensed by Federal Communications Commission.
62-122. Commission may set and regulate rates.
62-123. Granting of certificate for operation in established service area of another carrier.
62-124. Article not applicable to mobile radio telephone service.

Article 11.

Railroads.

- 62-247. Commission to establish and regulate stations for freight and passengers; abandonment of station or other facility or diminution of accommodations.

Article 12.

Motor Carriers.

- 62-281. Safety regulations applicable to motor carrier vehicles.

Article 15.

Penalties and Actions.

- 62-319. Riding on train unlawfully; venue.
62-326. Furnishing false information to the Commission; withholding information from the Commission.

ARTICLE 1.

General Provisions.

§ 62-1. Short title.

Applied in *S & R Auto & Truck Serv., Inc. v. City of Charlotte*, 268 N.C. 374, 150 S.E.2d 743 (1966).

Cited in *North Carolina Util. Comm'n v.*

United States, 253 F. Supp. 930 (E.D.N.C. 1966); *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E.2d 814 (1970).

§ 62-2. Declaration of policy.

Cross Reference.—See note to § 62-118.

Purpose of Chapter.—The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in § 62-133. *State ex rel. Utilities*

Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Section Declares Policy.—This section declares the policy of the State, which it is the purpose of this entire Chapter to put into effect. *State ex rel. Utilities Comm'n v. Morgan*, 277 N.C. 255, 177 S.E.2d 405 (1970).

There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Transportation of passengers by motor carriers for compensation is a business affected with a public interest. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Interconnection with Competitor Cannot Be Required.—There is no provision in this chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission; the Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Rate Scheme Held Unconstitutional.—The state regulatory scheme by which Utilities Commission sets rates for franchised carriers to charge the U.S. Army in transportation of household goods violates the national procurement policy and is an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Util. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-3. Definitions.—As used in this Chapter, unless the context otherwise requires, the term:

- (8) "Contract carrier by motor vehicle" means any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260.
- (9) "Contract carrier" means any person which under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation of persons or property for compensation, except as exempted in G.S. 62-260.
- (23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
 1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation;
 2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself

out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected.

3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;
 4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;
 5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;
 6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.
- b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.
 - c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.
 - d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, electric or telephone membership corporation or nonprofit water membership corporations financed by the Farmers Home Administration or any person not otherwise a public utility, who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person, other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter.
 - e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).
 - f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public

Utilities Act, shall include the town limits as they exist on May 8, 1973; and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

(1967, c. 1094, ss. 1, 2; 1971, c. 553; c. 634, s. 1; cc. 894, 895; 1973, c. 372, s. 1.)

Editor's Note. — The 1967 amendment, effective Sept. 30, 1967, substituted "under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission" for "under individual contracts or agreements" in subdivisions (8) and (9).

The first 1971 amendment inserted "or nonprofit water membership corporations financed by the Farmers Home Administration" near the beginning of paragraph d of subdivision (23).

The second 1971 amendment added paragraph e to subdivision (23).

The third 1971 amendment, effective Oct. 15, 1971, added the proviso at the end of the first sentence in paragraph d of subdivision (23).

The fourth 1971 amendment, effective Oct. 15, 1971, in subparagraph 2 of paragraph a of subdivision (23), substituted "10" for "25" and added the language beginning with "except that any person."

Session Laws 1971, c. 634, s. 3, provides: "In order to provide a period for the development by the University of North Carolina at Chapel Hill of records of the kind which may be required by the North Carolina Utilities Commission, the Utilities Commission shall have no authority in respect to the rates or service charges for the telephone service, electricity or water supplied to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9) until January 1, 1973."

The 1973 amendment added paragraph f to subdivision (23).

Session Laws 1973, c. 372, ss. 2 and 3 provide:

"Sec. 2. The North Carolina Utilities Commission shall grant a franchise to the Town of Pineville for the area within the present town limits; further, the Utilities Commission shall grant an interim franchise for the area proposed to be annexed, until January 1, 1975, by which time the town shall apply for a certificate of public convenience and necessity to operate in the area proposed to be annexed, and shall be granted such certificate of public convenience and necessity by the North Carolina Utilities Commission upon a showing by the Town of Pineville that it is fit, willing and able to provide adequate telephone services on a continuing basis to meet the needs of said area; provided further, that

the Town of Pineville may continue to serve its existing consumers outside of the present corporate limits so long as these consumers desire to have the Town of Pineville's telephone service.

"Sec. 3. In order to provide a period for the development by the Town of Pineville of records of the kind which may be required by the North Carolina Utilities Commission, the Utilities Commission shall have no authority in respect to the rates or charges for the telephone service supplied by the Town of Pineville to the public for compensation until July 1, 1974."

Only the opening paragraph and the subdivisions affected by the amendments are set out.

Definitions Are Not Controlling Where Terms Are Used Elsewhere.—The definitions of "public utility" and "franchise" as contained in this section are not controlling in determining whether an agreement of a municipality constitutes a franchise or a license, since the definitions of the statute do not purport to be authoritative definitions of those terms as used elsewhere. *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967).

Requirements for Permit to Operate as Contract Carrier.—In addition to the statutory requirements of § 62-262 and subdivision (8) of this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E.2d 814 (1970).

"Franchise" Generally Is Not Limited as in This Section.—The term "franchise," as used by the courts and by text writers, is not limited to a special right granted to a public utility, as it is defined in this section. *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967).

And "Public Utility" under § 160-2 Need Not Meet Definition of This Section.—The status of the grantee is a material factor in determining the validity of a grant of a franchise under the authority of § 160-2, for that statute authorizes municipal corporations to grant franchises only to "public utilities," though it does not necessarily follow that such grantee must be the operator of a business within the definition of

"public utility" contained in this section. *Kornegay v. City of Raleigh*, 269 N.C. 155, 152 S.E.2d 186 (1967).

Definition of "Public Utility" Cannot Be Expanded. — Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

If Applicant Is Not "Public Utility," Issuance of Certificate Is Nullity. — If an applicant's proposed service is not within the definition of "public utility" contained in subdivision (23) of this section, the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Service Up to Capacity Is Service to "Public" — One offers service to the "public" within the meaning of subparagraph 6 of paragraph a of subdivision (23) when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

What Constitutes a Contract Carrier. — See *State ex rel. Utilities Comm'n v. Petroleum Transp., Inc.*, 2 N.C. App. 566, 163 S.E.2d 526 (1968).

A common carrier by motor vehicle may be defined as a person who is not exempted from regulation under the provisions of § 62-260, and who holds himself out to the general public to engage in transportation of persons or property for compensation. *State ex rel. Utilities Comm'n v. J.D. McCotter, Inc.*, 16 N.C. App. 475, 192 S.E.2d 629 (1972), *aff'd*, 283 N.C. 104, 194 S.E.2d 859 (1973).

Telephone Answering or Message Relaying Service Not a "Public Utility" — Neither a telephone answering nor a message relaying service is a public utility

within the purview of subdivision (23) and cannot therefore be determinative upon the question of whether an applicant's proposed telephone service is substantially the same as that of the existing franchise holder. *State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc.*, 272 N.C. 591, 158 S.E.2d 855 (1968).

A mobile radio service falls clearly within the definition of "public utility" in subparagraph 6 of paragraph a of subdivision (23). *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Telephone Company Operated by University of North Carolina. — The Utilities Commission did not have jurisdiction to enter a regulatory order applicable to the telephone company operated by the University of North Carolina at Chapel Hill. *State ex rel. Utilities Comm'n v. Chapel Hill Tel. Co.*, 12 N.C. App. 543, 183 S.E.2d 802 (1971).

Municipal corporations are specifically excluded from the definition of a "public utility" in subdivision (23) of this section; consequently, a municipal corporation distributing and selling electric energy to its inhabitants, and to others in its vicinity, is not subject to regulation by the North Carolina Utilities Commission, and the provisions of this chapter do not apply to it, except as otherwise expressly stated therein. *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967); *State ex rel. Utilities Comm'n v. Hunt Mfg. Co.*, 16 N.C. App. 335, 192 S.E.2d 16 (1972).

A municipal corporation is specifically excluded from the definition of a public utility under the provisions of subdivision (23)d of this section. *State ex rel. Utilities Comm'n v. Town of Pineville*, 13 N.C. App. 663, 187 S.E.2d 473 (1972), *aff'd*, 17 N.C. App. 522, 195 S.E.2d 76 (1973).

Applied in *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705, *aff'd*, 17 N.C. App. 727, 195 S.E.2d 311 (1972).

Quoted in *State ex rel. Utilities Comm'n v. Kenan Transport Co.*, 10 N.C. App. 626, 179 S.E.2d 799 (1971).

Stated in *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

ARTICLE 2.

Organization of Utilities Commission.

§ 62-10. Number, appointment and terms of commissioners; chairman; vacancies; compensation; practice of law prohibited. — The North

Carolina Utilities Commission shall consist of five commissioners who shall be appointed by the Governor. The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed. The appointments to fill the term expiring on July 1, 1963, and the two terms expiring July 1, 1965, shall be for eight (8) years, and the appointments to fill the two terms expiring July 1, 1967, shall be for two (2) years, and thereafter for eight (8) years, with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The term of office of utilities commissioners thereafter shall be eight (8) years, commencing on July 1 of the year in which the predecessor term expired, and ending on July 1 of the eighth year thereafter. A commissioner in office shall continue to serve until his successor is duly appointed and qualifies but such hold over shall not affect the expiration date of such succeeding term. On July 1, 1963, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission until July 1, 1965, and on July 1, 1965, and every four (4) years thereafter, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission for the succeeding four (4) years and until his successor is appointed and qualifies. In case of death, incapacity, resignation or vacancy for any other reason in the office of any commissioner or the chairman prior to the expiration of his term of office or the time for which he was designated as chairman, his successor shall be appointed by the Governor to fill the unexpired term. The salary of each commissioner shall be the same as that fixed from time to time for the judges of the superior court except that the commissioner designated as chairman shall receive one thousand dollars (\$1,000.00) additional per annum. The prohibition of the practice of law by judges provided in G.S. 7-59 shall also apply to members of the Commission. (1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, substituted "judges of the superior court" for "highest paid member of the Council of State" in the eighth sentence.

State Government Reorganization.—

The Utilities Commission was transferred to the Department of Commerce by § 143A-174, enacted by Session Laws 1971, c. 864.

§ 62-20. Assistant attorney general and staff attorneys assigned to Utilities Commission; to represent public; employment of additional attorneys, expert witnesses, office and clerical help.

Applied in *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965); *State ex rel. Utilities Comm'n v. General Tel. Co.*, 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Cited in *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972); *State ex rel. Utilities Comm'n v. United Tel. Co. of the Carolinas, Inc.*, 15 N.C. App. 740, 190 S.E.2d 656 (1972).

ARTICLE 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission.

Stated in *State ex rel. Utilities Comm'n v. General Tel. Co.*, 17 N.C. App. 727, 195 S.E.2d 311 (1973).

Cited in *State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-31. Power to make and enforce rules and regulations for public utilities.

Commission Need Not Make Finding That Rule Is Reasonable and Necessary.— In adopting a rule pursuant to this section, the Utilities Commission need not make a finding of fact that the rule is reasonable

and necessary in order for it to administer and enforce the provisions of the Public Utilities Act. *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Cited in State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964); **State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.,** 3 N.C. App. 309, 164 S.E.2d 889 (1968); **State ex rel. Utilities Comm'n v. Kenan Transport Co.,** 10 N.C. App. 626,

179 S.E.2d 799 (1971); **State ex rel. Utilities Comm'n v. General Tel. Co.,** 281 N.C. 318, 189 S.E.2d 705 (1972); **State ex rel. Utilities Comm'n v. J.D. McCotter, Inc.,** 16 N.C. App. 475, 192 S.E.2d 629 (1972), *aff'd*, 283 N.C. 104, 194 S.E.2d 859 (1973).

§ 62-32. Supervisory powers; rates and service. — (a) Under the rules herein prescribed and subject to the limitations hereinafter set forth, the Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State.

(b) The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service. (1913, c. 127, s. 7; C. S., s. 1112(b); 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1959, c. 639, s. 12; 1963, c. 1165, s. 1.)

I. GENERAL CONSIDERATION.

Cross References.—

See note to § 62-118.

Editor's Note.—This section is set out to correct a typographical error in the historical citation as it appears in the replacement volume.

For note on control of public utilities through zoning ordinances, see 42 N.C. L. Rev. 761 (1964).

Purpose of Regulation.—An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

With public utilities the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In *re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

Property of Utility Is Private Property and Business Is Private Business.—

Notwithstanding the authority of the Commission to regulate its services and rates, and other matters incidental thereto, the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in this Chapter, a utility is free to manage its property and business as it sees fit and the Commission may not restrict, or control, the discretion of the board of directors in the acquisition of property, or in the price paid for it. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Quoted in State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Cited in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); **State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc.,** 272 N.C. 591, 158 S.E.2d 855 (1968); **State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.,** 3 N.C. App. 309, 164 S.E.2d 889 (1968).

review and make appropriate changes in the annual charge to operating expenses on account of depreciation. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-35. System of accounts.

Review of Annual Charge to Operating Expenses on Account of Depreciation.—If a reasonably close relationship between the reserve for depreciation and the actual accumulated depreciation is not present, the Utilities Commission may and should

§ 62-36. Reports by utilities; cancelling certificates for failure to file.

Editor's Note.—For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-37. Investigations.

Stated in *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

(c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State. (1933, c. 307, s. 10; 1949, c. 1029, s. 2; 1963, c. 1165 s. 1; 1965, c. 287, s. 6.)

Editor's Note. — The 1965 amendment added subsection (c).

As only subsection (c) was affected by the amendment, the rest of the section is not set out.

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re *Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

Duty to Render Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. *State ex rel. Utilities Comm'n v. Morgan*, 277 N.C. 255, 177 S.E.2d 405 (1970).

Utility Must Accept Responsibility. — A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. *State ex rel. Utilities Comm'n v. Morgan*, 277 N.C. 255, 177 S.E.2d 405 (1970).

Cited in *State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc.*, 272 N.C. 591, 158 S.E.2d 855 (1968); *State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-43. Fixing standards, classifications, etc.; testing service.

Notice Held Adequate. — On review of a hearing on a proposed amendment of a Utilities Commission rule defining and listing products which may be carried under a petroleum authority, appellant's contention that the Commission's adoption of an amendment introduced by appellees at the

hearing, rather than the proposed amendment attached to the notice of hearing, restricted the authorities of appellants without adequate notice was held to be without merit. *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

§ 62-44. Commission may require continuous telephone lines.

Statutes Requiring Interconnection with Competitor Should Not Be Extended beyond Plain Meaning. — The power to require the proprietor of a business to interconnect its facilities with those of a competitor is a drastic power. Statutes conferring it should not be extended beyond their plain meaning. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Interconnection with Competitor to Increase Its Share of Business Cannot Be Compelled. — There is no provision in this chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. *State ex rel. Utilities Comm'n*

v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Section Authorizes Requirement of Interconnection Only When One Company Cannot Serve Localities. — This section authorizes the Commission to require a connection of the lines of two telephone companies, but only when they serve localities which cannot be communicated with by the lines of one of them alone. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

It Does Not Authorize Compelling Telephone Company to Interconnect with Radio Company Serving Same Area. — This section may not reasonably be extended by construction to authorize the Commission to compel a telephone company to interconnect its system with the system of a radio company serving the identical area which the telephone company, itself, serves

or desires to serve. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Mobile Radio Service Company Is Not "Telephone or Telegraph Utility".—Even if the record is sufficient to support an order granting an applicant a certificate of public convenience and necessity to act as a common carrier of communications providing mobile radio service, the Commission has no statutory authority to require

a telephone utility to interconnect the applicant's radio communications system with the utility's land telephone system. If permitted to render such service, the applicant would not be a "telephone or telegraph utility," though it would be a public utility conveying or transmitting messages by "other means of transmission," namely, radio. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

§ 62-49. Publication of utilities laws.—The Commission is authorized and directed to secure publication of all North Carolina laws affecting public utilities, together with the Commission rules and regulations, in an annotated edition, and the Commission may adopt rules for distribution of said publication, and shall publish biennial supplements to said utilities laws containing all amendments and additions thereto, and may republish said laws at such times as may be reasonable and necessary. (1963, c. 1165, s. 1; 1967, c. 1133.)

Editor's Note.—

The 1967 amendment rewrote this section.

Stated in *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Cited in *State ex rel. Utilities Comm'n v. Petroleum Transp., Inc.*, 2 N.C. App. 566, 163 S.E.2d 526 (1968).

§ 62-50. Safety standards for interstate and intrastate natural gas pipelines.—(a) The safety standards of this chapter shall apply to the North Carolina portion of interstate natural gas pipelines extending to, from, within or through this State in interstate commerce to the same extent as said safety provisions apply to intrastate natural gas pipelines of natural gas utility companies and pipeline carriers operating under a franchise from the Utilities Commission. The Commission may require that interstate natural gas companies and interstate natural gas pipeline carriers operating interstate natural gas pipelines in this State and all intrastate natural gas utilities shall file with the Commission reports of all accidents occurring in connection with the operation of all natural gas pipelines located in North Carolina and to file with the Commission copies of its construction, operation and maintenance standards and procedures, and any amendments thereto, and such other information as may be necessary to show compliance with the safety standards promulgated by the Commission hereunder. Where the Commission has reason to believe that any interstate natural gas company or any intrastate natural gas utility is not in compliance with the Commission's safety standards, the Commission may, after notice and hearing, order said interstate natural gas company or intrastate natural gas utility, to take such measures as may be necessary to comply with such standards. The Commission is authorized to require said interstate natural gas pipeline companies or carriers and intrastate natural gas utilities to furnish engineering reports showing that said pipelines are in safe operating condition and are being operated in conformity with the Commission's safety standards.

(b) The Commission is hereby authorized to enter into agreements with the United States Department of Transportation and other federal agencies and with other states or public utilities commissions of other states for the regulation of natural gas pipelines located within the State of North Carolina and upon the execution of such cooperative agreements, the Commission is authorized to utilize Commission personnel for inspection, investigation, and regulation of safety standards for interstate and intrastate natural gas pipelines in North Carolina, and to share in the cost of such regulation with other agencies having duties with respect to the regulation of said natural gas pipelines, and to receive funds from the United States Department of Transportation for such regulation.

(c) The Utilities Commission is hereby authorized to enter into cooperative agreements for inspection of all natural gas pipelines of North Carolina to the end that the Utilities Commission may enter into agreements with the United States Department of Transportation or other federal or state agencies to regulate and inspect the safety standards for all natural gas pipelines in the State of North Carolina, including interstate natural gas pipelines.

(d) Any person who violates any provision of this section, or any regulation of the Utilities Commission issued thereunder, shall be subject to a civil penalty not to exceed one thousand dollars (\$1,000.00) for each violation for each day that the violation persists, the maximum civil penalty not to exceed two hundred thousand dollars (\$200,000.00) for any continuing violation.

(e) Any action for civil penalty or any claim for said penalty may be compromised by the Utilities Commission and settled for an agreed amount. In determining the amount of the penalty imposed in civil action, or the amount agreed upon in compromise, the amount of the penalty shall be considered in relation to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after any prior notification of a violation. The amount of the penalty, when finally determined in a civil action, or the amount agreed upon in compromise, may be deducted from any sums owing by the State to the person charged, or may be collected as in the case of any judgment in a civil action in the State courts.

(f) The General Court of Justice of North Carolina is authorized to issue court orders, restraining orders, injunctions and other processes of the court in actions by the Utilities Commission to enforce the provisions of this Chapter relating to gas pipeline safety, and the Commission is authorized to bring actions in said court, including actions for mandatory injunctions, restraining orders, temporary restraining orders, penalties, damages and such other relief as may be necessary to secure compliance with the provisions of this section and regulations of the Commission duly enacted and adopted hereunder relating to gas pipeline safety. This provision is in addition to other powers of the Commission and the courts in relation to the enforcement of provisions of this Chapter in the courts, and shall not limit the present powers of the Commission in bringing actions in the courts for enforcement of other provisions of this Chapter.

(g) For the purposes of this section, "intrastate natural gas utilities" shall include municipal corporations operating municipally owned gas distribution systems, to the end that said systems shall be subject to the enforcement of gas safety standards by the Commission, provided that this Chapter shall in no other way apply to municipally owned gas distribution systems. (1967, c. 1134, s. 1; 1969, c. 646; 1971, cc. 549, 1145.)

Editor's Note.—Session Laws 1967, c. 1134, s. 3, makes this section effective Jan. 1, 1968.

The 1969 amendment, effective Sept. 15, 1969, designated the former provisions of this section as subsection (a) and added subsections (b), (c), (d) and (e).

The first 1971 amendment, effective Oct. 15, 1971, added subsection (f).

The second 1971 amendment added subsection (g).

§ 62-51. To inspect books and records of corporations affiliated with public utilities.—The Utilities Commission and its employees are hereby authorized to inspect the books and records of corporations affiliated with public utilities regulated by the Utilities Commission under the provisions of this chapter, including parent corporations and subsidiaries of parent corporations. This authorization shall extend to all reasonably necessary inspection of all books and records of account and agreements and transactions between public utilities doing business in North Carolina and their affiliated corporations where such records relate either directly or indirectly to the provision of intrastate service by the utility. The right to inspect such books and records shall apply both to books

and records in the State of North Carolina and such books and records located outside of the State of North Carolina. If any such affiliated corporation shall refuse to permit such inspection of its books and records and its transactions with public utilities doing business in North Carolina, the Utilities Commission is empowered to order the public utility regulated in North Carolina to show cause why it should not secure from its affiliated corporation such books and records for inspection in North Carolina or why their franchise to operate as a public utility in North Carolina should not be cancelled. (1969, c. 764, s. 1.)

Editor's Note. — Session Laws 1969, c. 764, s. 3, makes the act effective Sept. 15, 1969.

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

ARTICLE 4.

Procedure before the Commission.

§ 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

Editor's Note.—For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

When the Commission is conducting a hearing, it is acting in a judicial capacity and shall render its decision upon questions of law and of fact in the same manner as a court of record. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

Ordinarily, the procedure, etc.—

In accord with 1st paragraph in original. See State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The Commission is required by § 62-65 (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." This section provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Substance and not form, etc.—

In accord with original. See State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The Commission may enlarge or restrict the inquiry, etc.—

In accord with original. See State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Order in Opinion Concurred In by Majority Is Order of Commission.—Where a majority of the commissioners concurred in the order set forth in the opinion by one of them, it was the order of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And Findings of Fact Not Disagreed With in Other Opinions Are Those of Commission.—Where neither of the two concurring opinions nor the two dissenting opinions indicate any disagreement with any of the findings of fact stated in the opinion of another commissioner and the opinion of no other commissioner suggests any other findings of fact, the findings of fact so stated in the opinion of the commissioner are, therefore, concurred in by a majority, if not all of the members of the Commission, and are, therefore, the findings of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Issues of Fact Not to Be Decided before All Evidence Is Offered.—It is erroneous if controverted questions of fact, or issues of fact, are decided by the Commission before all of the competent evidence of the parties is offered with respect thereto. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

Different Reasons Given by Concurring Commissioners Are Not Grounds for Reversal.—When this section and § 62-79 (a) are construed together, as they must be, it

is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, may be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Finding May Be Based on "Late" Exhib-

§ 62-65. Rules of evidence; judicial notice.

(b) The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice. When any Commission decision relies upon such judicial notice of material facts not appearing in evidence, it shall be so stated with particularity in such decision and any party shall, upon petition filed within 10 days after service of the decision, be afforded an opportunity to contest the purported facts noticed or show to the contrary in a rehearing set with proper notice to all parties; but the Commission may notify the parties before or during the hearing of facts judicially noticed, and afford at the hearing a reasonable opportunity to contest the purported facts noticed, or show to the contrary. (1949, c. 989, s. 1; 1959, c. 639, s. 2; 1963, c. 1165, s. 1; 1973, c. 108, s. 21.)

Editor's Note. — The 1973 amendment substituted "justices and judges of the General Court of Justice" for "Justices of the Supreme Court and judges of the superior courts" at the end of the first sentence of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

Informality of Procedure. — The Commission is required by subsection (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." Section 62-60 provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Admission of Expert-Opinion Evidence. — In a rule-making proceeding, the Utili-

ties Commission did not err in the admission of expert-opinion evidence without a specific finding that the witness was an expert, since the admission of the evidence over objection and the denial of a motion to strike constituted the Commission's ruling that the witness was qualified as an expert. *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Findings May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Quoted in *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

§ 62-68. Use of affidavits.

Editor's Note.—For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-72. Commission may make rules of practice and procedure.

Editor's Note. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

In the absence, etc.—

In accord with original. See *State ex rel. North Carolina Util. Comm'n v. Western*

Cited in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963)

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-73. Complaints against public utilities.

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-75. Burden of proof.

Plaintiff Must Prove Facts Essential to Relief.—This section imposes upon plaintiff the burden of proving the facts essential to its right to relief from the relationship of which it complains. *State ex rel. Utilities Comm'n v. Nello L. Teer Co.*, 266 N.C. 366, 146 S.E.2d 511 (1966).

The burden is upon carriers asking for an increase in rates to prove justification for the increase and that the proposed rate is just and reasonable. *State ex rel. North Carolina Util. Comm'n v. Southern Ry.*, 267 N.C. 317, 148 S.E.2d 210 (1966).

And Not upon Shippers or Customers.—At a hearing on a proposed increase in charges for railroad services the shippers and customers of the railroads have no burden of proving anything; the previous rates are presumed to be fair and reason-

able and so are the orders of the Commission. *State ex rel. North Carolina Util. Comm'n v. Southern Ry.*, 267 N.C. 317, 148 S.E.2d 210 (1966).

And the burden of proof is upon an applicant for a certificate of public convenience and necessity to show there is a public convenience and necessity for its proposed service. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972); *State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n*, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

Stated in *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

§ 62-79. Final orders and decisions; findings; service; compliance.

The Commission is required by this section to find all facts essential to a determination of the question at issue. *State ex rel. Utilities Comm'n v. Queen City Coach Co.*, 4 N.C. App. 116, 166 S.E.2d 441 (1969).

"Material Issues of Fact."—When the record before the Commission presents the questions of the original cost, less depreciation, and the replacement cost, less depreciation, these are "material issues of fact," upon each of which the Commission must make its finding. *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Determination of "Fair Value."—Having made the findings, properly supported, it is for the Commission, not the reviewing

court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972).

While the Commission has the duty to weigh evidence of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Different Reasons Given by Concurring

Commissioners Are Not Grounds for Reversal.—When § 62-60 and subsection (a) of this section are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, may be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and or-

der. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Stated in State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

§ 62-80. Powers of Commission to rescind, alter or amend prior order or decision.

Procedure Informal.—Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions. *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Authority to Rescind, Alter or Amend Is Discretionary.—The statutory authority of

the Utilities Commission, to rescind, alter or amend any order or decision made by it, upon proper notice to parties and after opportunity for hearing, is obviously discretionary. *State ex rel. Utilities Comm'n v. Services Unlimited*, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

An appeal does not lie from the denial of a petition to rehear. *State ex rel. Utilities Comm'n v. Services Unlimited*, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§ 62-82. Special procedure on application for certificate for generating facility; appeal from award order.—(a) **Notice of Application for Certificate for Generating Facility; Hearing; Briefs and Oral Arguments.**—Whenever there is filed with the Commission an application for a certificate of public convenience and necessity for the construction of a facility for the generation of electricity under G.S. 62-110.1, the Commission shall require the applicant to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed and thereafter the Commission, upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three (3) months after the filing of such application, and the procedure for rendering decisions therein shall be given priority over all other cases on the Commission's calendar of hearings and decisions, except rate proceedings referred to in G.S. 62-81. Such applications shall be heard by the full Commission, and the Commission shall furnish a transcript of evidence and testimony submitted by the end of the second business day after the taking of each day of testimony. The Commission shall require that briefs and oral arguments in such cases be submitted within thirty (30) days after the conclusion of the hearing, and the Commission shall render its decision in such cases within sixty (60) days after submission of such briefs and arguments. If the Commission does not, upon its own initiative, order a hearing and does not receive a complaint within ten (10) days after the last day of publication of the notice the Commission shall enter an order awarding the certificate.

(b) **Compensation for Damages Sustained by Appeal from Award of Certificate under § 62-110.1; Bond Prerequisite to Appeal.**—Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs,

and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. The Commission may, when there are two or more such appealing parties, permit them to file a joint bond or undertaking. If the award order of the Commission is affirmed on appeal, the Commission shall determine the amount, if any, of damages sustained by the party to whom the certificate was awarded, and shall issue appropriate orders to assure that such damages be paid and, if necessary, that the bond or undertaking be enforced. (1965, c. 287, s. 3.)

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions. — (a) No party to a proceeding before the Commission may appeal from any final order or decision of the Commission unless within thirty (30) days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commission, by order made within thirty (30) days, the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

(d) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The appellant shall cause to be prepared a statement of the case as required by the rules of the Court of Appeals. A copy of this statement shall be served on the Commission and all other parties, as appellees, within 45 days from the entry of the appeal taken; within 20 days after such service, the appellee shall return the copy with its approval or specified amendments endorsed or attached; if the case be approved by the appellee it shall be filed by the appellant with the Clerk of the Court of Appeals as part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. The Commission shall have the power, in the exercise of its discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.

(e) If the case on appeal is returned by appellee with objections as prescribed, or if a counter case is served on appellant, the appellant shall immediately request the Utilities Commission to fix a time and place for meeting to agree on the case on appeal. If the appellant delays longer than 15 days after the appellee serves its counter case or exceptions to request the Commission to set a meeting to agree on the case on appeal, then the exceptions filed by the appellee shall be allowed, or the counter case served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.

(f) The Commission shall forthwith notify the attorneys of the parties to meet before it for the purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the Commission shall determine if all parties have agreed on a case on appeal. If they have, the appellant shall within five days thereafter file it with the Clerk of the Court of Appeals, and if he fails to do so the appellee may file its copy. If the case on appeal is not agreed upon by all parties to the appeal at said meeting, the Commission shall immediately file with the Court of Appeals a request for appointment of a referee to settle the case on appeal, whereupon the chief judge of the Court of Appeals shall appoint a referee to settle and sign the case on appeal under such rules as may be set forth in his appointment.

(g) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals. (1949, c. 989, s. 1; 1955, c. 1207, s. 1; 1959, c. 639, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 1.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, deleted former subsections (b) and (d), redesignated former subsection (c) as present subsection (b), and added present subsections (c), (d), (e), (f), and (g).

When Review by Court of Appeals Precluded.—The Court of Appeals is without jurisdiction to review an original order of

the Utilities Commission where no appeal has been taken from the order and the time for giving notice and perfecting appeal has expired. *State ex rel. Utilities Comm'n v. Services Unlimited*, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Cited in *State ex rel. Utilities Comm'n v. General Tel. Co.*, 17 N.C. App. 727, 195 S.E.2d 311 (1973).

§ 62-91. Appeal docketed; title on appeal; priorities on appeal.—Unless otherwise provided by the rules of the Court of Appeals, the cause on appeal from the Utilities Commission shall be entitled "State of North Carolina ex rel. Utilities Commission (here add any additional parties in support of the Commission Order and their capacity before the Commission), Appellee(s) v. (here insert name of appellant and his capacity before the Commission), Appellant." Appeals from the Utilities Commission pending in the superior courts on September 30, 1967, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. Appeals to the Court of Appeals under G.S. 7A-29 shall be docketed in accordance with the rules of the Court of Appeals. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 6.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

§ 62-92. Parties on appeal.—In any appeal to the Court of Appeals, the complainant in the original complaint before the Commission shall be a party to the record and each of the parties to the proceeding before the Commission shall have a right to appear and participate in said appeal. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 2.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, substituted "Court of Appeals" for "superior court."

§ 62-94. Record on appeal; extent of review.—(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of the Court of Appeals.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commis-

sion, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this chapter shall be prima facie just and reasonable. (1949, c. 989, s. 1; 1955, c. 1207, s. 3; 1963, c. 1165, s. 1; 1969, c. 614.)

I. GENERAL CONSIDERATION.

Editor's Note.—The 1969 amendment, effective Sept. 15, 1969, rewrote subsection (a) and eliminated the former second sentence of subsection (e), relating to trial by jury.

For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

Appeals from the Utilities Commission Are Confined, etc.—

Where the evidence is sufficient to permit and sustain the Commission's findings of fact, conclusions and the decision based thereon, the Supreme Court will consider the proceedings before the Commission only to the extent necessary to determine whether the Court of Appeals committed an error of law. *State ex rel. Utilities Comm'n v. J.D. McCotter, Inc.*, 283 N.C. 104, 194 S.E.2d 859 (1973).

Limitation on Authority to Review.—The authority of the Court of Appeals and of the Supreme Court in reviewing an order of the Utilities Commission is limited to that conferred by this section. *State ex rel. Utilities Comm'n v. Morgan*, 277 N.C. 255, 177 S.E.2d 405 (1970).

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section. *State ex rel. Utilities Comm'n v.*

General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Subsection (b) States Authority of Court.—The authority of the court to which an appeal is taken from an order of the Utilities Commission is stated in subsection (b) of this section. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

Courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission, except on showing of capricious, unreasonable or arbitrary action or disregard of law. *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

Weighting of Evidence, etc.—

The credibility of testimony and the weight to be given it are for the Commission, not for the reviewing court. *State ex rel. Utilities Comm'n v. City of Durham*, 282 N.C. 308, 193 S.E.2d 95 (1972).

Commission without Discretionary Power Where No Evidence to Weigh.—The weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission; even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh. *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

Determination by Commission Is, etc.—

In accord with 2nd paragraph in original. See *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

Upon appeal, rates fixed by the Commission shall be deemed *prima facie* just and reasonable. *State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 146 S.E.2d 487 (1966).

Commission's Findings Are Conclusive, etc.—

Findings supported by competent, material, and substantial evidence in view of the entire record are binding upon the reviewing court. *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

It is well established that the Commission's findings of fact are conclusive and binding when supported by competent, material, and substantial evidence in view of the entire record as submitted. *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 269 N.C. 717, 153 S.E.2d 461 (1967).

All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972); *State ex rel. Utilities Comm'n v. City of Durham*, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Commission's finding, being supported by competent, material and substantial evidence in view of the entire record as submitted, is conclusive and binding on appeal. *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Although Reviewing Court would Have Reached Different Conclusion. — Neither findings of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Determination of "Fair Value".—While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair

value." *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The Commission, not the reviewing court, is to make the determination of the fair value of the properties. *State ex rel. Utilities Comm'n v. City of Durham*, 282 N.C. 308, 193 S.E.2d 95 (1972).

When Order Remanded to Commission for Further Hearing. — An order of the Commission based on erroneous interpretation of law should be remanded to the Commission for further hearing and not be terminated by the court, where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense and the utility is entitled to have the determination made. *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

Questions on appeal from the Commission must be determined upon the record certified by it. *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

Unless Facts Are in Record, Commission's Expert Knowledge Cannot Be Considered. — The Commission's knowledge, however expert, cannot be considered by the Supreme Court on appeal, unless the facts embraced within that knowledge are in the record. *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

In the consideration of an appeal the court is required to review the whole record, or such portions thereof as may be cited. *State ex rel. Utilities Comm'n v. Nello L. Teer Co.*, 266 N.C. 366, 146 S.E.2d 511 (1966).

And due account shall be taken of the rule of prejudicial error in the consideration of an appeal. *State ex rel. Utilities Comm'n v. Nello L. Teer Co.*, 266 N.C. 366, 146 S.E.2d 511 (1966).

Applied in *State ex rel. North Carolina Utils. Comm'n v. Southern Ry.*, 267 N.C. 317, 148 S.E.2d 210 (1966); *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Stated in *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in *State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc.*, 272 N.C. 591, 158 S.E.2d 855 (1968).

§ 62-95. Relief pending review on appeal. — Pending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, a judge of the Court of Appeals is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the applicant for such stay to post adequate bond as required by the court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 8.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, substituted "a judge of the Court of Appeals" for "the judge of the superior court" in the second sentence.

§ 62-96. Appeal to Supreme Court.—In all appeals heard in the Court of Appeals, any party may file a motion for review in the Supreme Court of the decision of the Court of Appeals under G.S. 7A-31, and in cases entitled to be appealed as a matter of right under G.S. 7A-30 (3) any party may appeal to the Supreme Court from the decision of the Court of Appeals under the same rules and regulations as are prescribed by law for appeals, except that the Commission, if it shall appeal, shall not be required to give any undertaking or make any deposit to assure the cost of such appeal, and such court may advance the cause on its docket. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 3.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, rewrote that portion of this section preceding the words "under the same rules and regulations."

When Supreme Court May Affirm Judgment Reversing Commission.—Upon an appeal to the Supreme Court from a judgment of the superior court (now the Court of Appeals), reversing a decision of the Commission and remanding the matter for further proceedings, the Supreme Court may affirm the judgment of the superior court, if the record discloses one or more of the statutory grounds for such judgment and if such ground therefor is set forth specifically in the notice of appeal from the Commission to the superior court. State

ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

In order to affirm a judgment of the superior court (now the Court of Appeals) reversing and remanding a decision of the Commission, it is not required that the Supreme Court concur in the ruling by the superior court upon every ground for relief set forth in the notice of appeal from the Commission to the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant. 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 62-98. Peremptory mandamus to enforce order, when no appeal.

(b) An appeal shall lie to the Court of Appeals in behalf of the Commission, or the defendant, from the refusal or the granting of such peremptory mandamus. The remedy prescribed in this section for enforcement of orders of the Commission is in addition to other remedies prescribed by law. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 4.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, substituted "An appeal shall lie to the Court of Appeals" for "An appeal shall lie to the Supreme Court"

at the beginning of the first sentence in subsection (b).

As subsection (a) was not affected by the amendment, it is not set out

§ 62-99: Repealed by Session Laws 1967, c. 1190, s. 5, effective October 1, 1967.

ARTICLE 6.

*The Utility Franchise.***§ 62-110. Certificate of convenience and necessity.**

The basis for the requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Requirement Curtails Competition.—Regarding public utilities, competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

By this section the State has granted to the utility company a legal monopoly upon a service vital to the economic well-being and the domestic life of the people of a large territory. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise commands a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Certificate Is Not Required If Business Is Not Public Utility.—One does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a "public utility" as defined in § 62-3 (23). State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Nor before City Issues Franchise to Television Cable Company.—Even if a television cable company be a "public utility" as defined in § 62-3, it is not required that it obtain from the Utilities Commission a certificate of public convenience and necessity before a franchise be issued by a city to it. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

But It Is Required before Utility Commences Construction or Operation.—A

certificate of public convenience and necessity from the Utilities Commission is required by this section before a public utility may commence construction of its plant or operation of its business. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

Issuance of Certificate Is Nullity If Applicant Is Not Public Utility.—If an applicant's proposed service is not within the definition of "public utility" contained in subdivision (23) of § 62-3, the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And in Excess of Commission Authority.—To grant a certificate of public convenience and necessity to conduct a business which is not a public utility, within the definition of the statute, would be both arbitrary and in excess of the statutory authority of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And Issuance Does Not Transform Ordinary Business into Public Utility.—The issuance of a certificate of public convenience and necessity by the Commission does not transform an ordinary business into a public utility, so as to entitle its operator to the rights of a public utility, or so as to impose upon him the duties and limitations of a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Definition of Public Utility Cannot Be Extended.—Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Finding of Both Convenience and Public Need Is Required.—A finding by the Commission that the rendering of the proposed service by an applicant would be a convenience to the public, even if supported by competent and substantial evidence, is not adequate basis for an order granting the applicant a certificate of public convenience and necessity. To entitle the applicant to such a certificate it is, of course, not nec-

essary for him to show, and the Commission to find, that the proposed service is necessary in the sense of being indispensable. Nevertheless, a mere showing of convenience is not sufficient. There must be an element of public need for the proposed service by the applicant in the area. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

The Commission is authorized to issue a certificate of public convenience and necessity if, but only if, the Commission has made findings of fact, supported by competent, material, and substantial evidence, which findings, in turn, support the conclusion that public convenience and necessity "require or will require" the proposed operation by the applicant. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Certificate Will Not Be Granted to Competitor without Finding Service Will Not Be Rendered.—The requirement of a certificate of public convenience and necessity is not an absolute prohibition of competition between public utilities rendering the same service. There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Where a public utility has a certificate of convenience and necessity for telephone service in a certain area and is ready and able to provide such area a mobile radio service, the Utilities Commission should deny an application for a certificate of public convenience and necessity to an applicant who proposes to render substantially the same mobile radio service in the area, and the fact that the applicant proposes to offer an electronic personal paging service as an auxiliary to its mobile radio service is not a sufficient difference to justify the issuance of the certificate when it appears that the Commission can compel the es-

tablished utility to install such a service when the public convenience so requires. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Services Need Not Be Identical to Give Utility Serving Area Prior Right.—Two services need not be identical in every respect in order to give the utility already serving the area the prior right. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

A certificate of public convenience and necessity authorizing its holder to render telephone service grants to the holder the right to adopt new methods of telephonic communications, including a mobile radio telephone service. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

A certificate of public convenience and necessity, which authorizes its holder to render "telephone service," does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Neither a telephone answering nor a message relaying service is a public utility within the purview of § 62-3 (23) and cannot therefore be determinative upon the question of whether an applicant's proposed telephone service is substantially the same as that of the existing franchise holder. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Applied in State ex rel. Utilities Comm'n v. Town of Pineville, 17 N.C. App. 522, 195 S.E.2d 76 (1973); State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

Stated in State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972), aff'd, 17 N.C. App. 522, 195 S.E.2d 76 (1973).

§ 62-110.1. Certificate for construction of generating facility.—(a) Notwithstanding the proviso in G.S. 62-110, no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility

service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

(b) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State, and the term "public utility service" shall include the service rendered by any such electric membership corporation. (1965, c. 287, s. 2.)

§ 62-110.2. Electric service areas outside of municipalities.—(a) As used in this section, unless the context otherwise requires, the term:

- (1) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; and
- (2) "Line" means any conductor for the distribution or transmission of electricity, other than
 - a. In the case of overhead construction, a conductor from the pole nearest the premises of a consumer to such premises, or a conductor from a line tap to such premises, and
 - b. In the case of underground construction, a conductor from the transformer (or junction point, if there be one) nearest the premises of a consumer to such premises.

- (3) "Electric supplier" means any public utility furnishing electric service or any electric membership corporation.

(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

- (1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.
- (2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965 which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.
- (3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965 which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965 to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.
- (4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not

so chosen by the consumer shall not thereafter furnish service to such premises.

- (5) Any premises initially requiring electric service after April 20, 1965 which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.
 - (6) Any premises initially requiring electric service after April 20, 1965 which are located partially within a service area assigned to one electric supplier and partially within a service area assigned to another electric supplier pursuant to subsection (c) hereof, or are located partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and partially within 300 feet of the lines of another electric supplier, as such lines exist on April 20, 1965 or as extended to serve consumers it has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and the electric supplier not so chosen shall not thereafter furnish service to such premises.
 - (7) Any premises initially requiring electric service after April 20, 1965 which are located only partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and are located wholly outside the service areas assigned to other electric suppliers and are located wholly more than 300 feet from other electric suppliers' lines, may be served by any electric supplier which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.
 - (8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.
 - (9) No electric supplier shall furnish temporary electric service for the construction of premises which it would not have the right to serve under this subsection if such premises were already constructed. The construction of lines for, and the furnishing of, temporary service for the construction of premises which any other electric supplier, if chosen by the consumer, would have the right to serve if such premises were already constructed, shall not impair the right of such other electric supplier to furnish service to such premises after the construction thereof, if then chosen by the consumer; nor, unless the consumer chooses to have such premises served by the supplier which furnished the temporary service, shall the furnishing of such temporary service or the construction of a line therefor impair the right of any other electric supplier to furnish service to any other premises which, without regard to the construction of such temporary service line, it has the right to serve.
 - (10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section; provided, that nothing in this section shall restrict the right of an electric supplier to furnish electric service to itself or to exchange or interchange electric energy with, purchase electric energy from or sell electric energy to any other electric supplier.
- (c) (1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable

after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

- (2) The Commission, upon agreement of the affected electric suppliers, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another; and the Commission, notwithstanding the lack of such agreement, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another, except premises being served by the other electric supplier or to which any of its facilities for service are attached and except such portions of such area as are within 300 feet of the other electric supplier's lines, upon finding that such reassignment is required by public convenience and necessity. In determining whether public convenience and necessity requires such reassignment, the Commission shall consider, among other things, the adequacy and dependability of the service of the affected electric suppliers, but shall not consider rate differentials between such electric suppliers.

(d) Notwithstanding the provisions of subsection (b) and (c) of this section:

- (1) Any electric supplier may furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, upon agreement of the affected electric suppliers; and
- (2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

(e) The furnishing of electric service in any area which becomes a part of any municipality after April 20, 1965, either by annexation or incorporation, (whether or not such area, or any portion thereof, shall have been assigned pursuant to subsection (c) of this section) shall be subject to the provisions of article 41 of subchapter X of chapter 160 of the General Statutes, and any provisions of this section inconsistent with said article shall not be applicable within such area after the effective date of such annexation or incorporation. (1965, c. 287, s. 5.)

Purpose.—One of the purposes of this chapter is to vest the Utilities Commission with authority and responsibility to assign territory to electric suppliers. *State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968).

A principal purpose of this section is to provide an orderly method for allocation of service areas as among competing suppliers of electricity and thereby to eliminate unnecessary duplication of electric line facilities. *State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp.*, 3 N.C. App. 318, 164 S.E.2d 895 (1968).

Another purpose of this chapter, and particularly subsection (b) of this section, is to declare certain rights of electric suppliers in areas outside of municipalities pending the assignment of territory. *State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968).

The overriding purpose of this section is to promote the public interest, not the business of the electric membership cooperative or that of the investor-owned utility. *State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970).

Prior to the enactment of this section in 1965, there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power except as established by contract. *State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969).

Prior to the enactment of this section, electric membership cooperatives and investor-owned public utility companies were free to compete in the rural portions of this State, in the absence of contractual restrictions upon such right, irrespective of the fact that such competition resulted in substantial duplication of power lines and facilities. *State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970).

The former absence of statutory provisions restricting competition between electric membership corporations and public utility suppliers of electric power gave rise to many contracts between these two types of suppliers designed to fix their respective territorial rights, which contracts, in turn, gave rise to much litigation. In the hope of putting an end to or reducing this turmoil, the 1965 legislature enacted this section, the language of which was the result of collaboration and agreement between the

two types of suppliers. *State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970).

Construction.—Where provisions of this section relating to assignment of electric service territory in rural areas are clear and understandable on their face, the Supreme Court is not required to construe this statute in connection with other provisions of this chapter relating to powers of the Utilities Commission to regulate public utilities. *State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969).

"Premises," as that word is defined in subsection (a) (1), embraces the manufacturing plant of an electric consumer and not the tract upon which it is located; consequently, public membership corporation had no right under subsection (b) (1) to provide electric service to a plant on the ground that it had served a residence and electric signs previously located on the tract. *State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969).

"Electric Suppliers" Defined. — Electric power companies and electric membership corporations are defined by statute as "electric suppliers"; municipally-owned systems are not so defined. *State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Service to Premises Assigned to a Supplier. — Subsection (b) of this section confers upon each electric supplier in the State the right, in territories outside of municipalities, to serve all "premises" being served by it on April 20, 1965, and the right to serve "premises" initially requiring service after that date, located within 300 feet of a line of such supplier and not in a territory assigned by the Utilities Commission to a different supplier, pursuant to subsection (c) of this section. *State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970).

Any "premises" in territories lying outside of a municipality and more than 300 feet from the line of any electric supplier can be served, prior to an assignment of such territory by the Utilities Commission, by any electric supplier chosen by the user, and services of such premises by any other supplier is prohibited. *State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970).

The language of subsection (b) (5) is

clear and unambiguous and presents no problem of construction. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968).

Subsection (c) contemplates the assignment of a territory to a single supplier for all classes of users of electric power, nothing else appearing. However, the statutory direction that the Commission assign service areas "by adequately defined boundaries" does not compel the conclusion that the intent of the legislature was to require the Commission to choose between (1) jeopardizing the industrial development of a geographic area by assigning it exclusively to an electric membership cooperative, or (2) boxing the cooperative into the narrow strips bordering its existing lines by assigning the territory outside those strips to an investor-owned utility for all types of electric service. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

But One Area May Be Assigned Jointly to Two Electric Suppliers.—The Utilities Commission did not exceed its authority under this section in assigning the same areas jointly to two electric suppliers, subject to consumers' reasonable choice of supplier, since under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may require such an assignment. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

The Commission did not exceed its statutory authority in making an assignment of an area jointly to two electric suppliers. State ex rel. Utilities Comm'n v. Edgecombe-Martin County Elec. Membership Corp., 5 N.C. App. 680, 169 S.E.2d 225 (1969).

The Utilities Commission did not arbitrarily exercise its discretion in assigning the same areas jointly to two electric suppliers, where it is shown that the Commission exercised its discretionary authority in good faith in the light of existing facts and circumstances. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may determine that some areas be assigned to two or more electric suppliers with later

determination of the circumstances under which a particular electric supplier may properly extend service to a particular consumer. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

And Division May Be Made on Basis of Users' Demand Level.—Subsection (c) of this section authorizes the Commission, having determined, upon sufficient and competent evidence, that the public convenience and necessity would best be promoted by dividing the geographic area into two service areas on the basis of the users' demand levels, to permit, on the basis of public convenience and necessity, an electric membership cooperative, to which the area of the smaller demands has been assigned, to serve a user whose demand is above the division line, if that user desires to become a member of the cooperative and thus to use its service. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

It is within the statutory authority of the Commission, when the public convenience and necessity so requires, to assign a territory to one supplier of electricity for service below a specified level of demand and to another supplier for service above that level of demand. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Legislature Determines What Policy Is in Public Interest.—It is for the legislature, not for the Supreme Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power, or the policy of territorial monopoly, or an intermediate policy is in the public interest. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Neither Supreme Court Nor Utilities Commission May Forbid Service.—If the legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither the Supreme Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

The Commission cannot arbitrarily attach conditions to a franchise, for it must

exercise its discretion in good faith in the light of existing facts and circumstances. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

What Commission May Consider in Assigning Areas to Electric Suppliers. — In assigning rural service areas to electric suppliers pursuant to this section, the Utilities Commission may consider, in addition to development of natural resources and employment opportunities, (1) the past history of service to residential, agricultural, and small commercial users in adjacent territories, (2) the capital required for supplying electric power to large users in the territory and the past experience of a supplier in serving such users, and (3) the demonstrated preference of a substantial class of potential users for one supplier over another. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Subsection (c) of this section declares the purpose for which the authority to assign "areas" is conferred upon the Commission. That purpose is "to avoid unnecessary duplication of electric facilities." To accomplish this objective, the statute directs the Commission to make assignments "in accordance with public convenience and necessity." In determining whether an assignment is in accord with "public convenience and necessity," the Commission is directed to consider the "adequacy and dependability of the service of electric suppliers." It is also directed to consider "other things." State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The attraction to a sparsely settled rural territory of industry, which will develop its natural resources and provide opportunity of employment to its residents, is one of the "other things" to be considered by the Commission in determining what assignment of territory to electrical suppliers will be in accord with public convenience and necessity. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Authority of Utilities Commission to Restrict Competition. — The Utilities Commission is a creature of the legislature and has no authority to restrict competition between suppliers of electricity, except insofar as that authority has been conferred upon it by statute. State ex rel. Utilities Comm'n

v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

One seeking electric service should not be denied the right to choose between vendors unless compelled by some cogent reason. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Right of Chosen Electric Supplier to Deny Service. — Conclusion of the Utilities Commission that a consumer has the unrestricted choice of electric supplier under subsection (b) of this section is subject to the right of the chosen electric supplier to deny the service unless required by the Utilities Commission. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

An electric membership corporation and a public utility corporation are free to compete in rural areas unless forbidden by some provision of this section. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in the rural areas of this State, notwithstanding the fact that such competition may result in substantial duplication of electric power lines and other facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

No Territorial Monopoly. — In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly or other right to prevent its competitor from serving anyone who desires the competitor to do so. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Extension of Facilities Requires Certificate of Public Convenience and Necessity. — The police power of the State is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from the Utilities Commission a certificate that public convenience and necessity requires the proposed extension of its distribution facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

§ 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112 (b) (5). (1947, c. 1008, s. 22; 1949, c. 1132, s. 20; 1953, c. 1140, s. 3; 1957, c. 1152, s. 10; 1961, c. 472, ss. 6, 7; 1963, c. 1165, s. 1; 1967, c. 1202.)

Editor's Note. — The 1967 amendment, effective Sept. 30, 1967, added subsection (e).

As the rest of the section was not affected by the amendment, it is not set out.

"Public Convenience and Necessity". — The requirement of "public convenience and necessity" referred to in subsection (a) of this section is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need which was shown to exist when the authority was originally acquired. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The criteria "if justified by the public convenience and necessity" in subsection (a) of this section has been interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in § 62-262(e). Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity was shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Showing of Public Need Not Required.

—The showing of public need which § 62-262(e)(1) requires of an application for a new authority is not applicable in a transfer proceeding under this section and was not written into it by subsection (a) of this section. State ex rel. Utilities Comm'n

v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

State Policy Favors Transfers of Actively Operated Motor Freight Carrier Certificates. — The policy of the State, as declared in the Public Utilities Act of 1963, clearly favors transfers of actively operated motor freight carrier certificates without unreasonable restraint. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Section Does Not Protect Existing Certificate Holders from Lawful Competition.

—Subsection (e) of this section does not indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "public convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need required by § 62-262(e)(1). State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

And a Transfer to a More Competitive Carrier Is Not Prohibited.—The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to the public interest as a matter of law. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Requirement of subsection (e) of this section that the Commission find that the proposed transfer "will not adversely affect the service to the public under said franchise" is satisfied by a determination that the proposed transferee of the franchise is capable of rendering service equal to that of the proposed transferor, and does not prohibit approval where transfer of the franchise to a more competitive hauler would have an adverse effect on

existing carriers. *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Bond as Condition Precedent to Commission's Approval.—This section requires as a condition precedent to Commission's approval of the sale of a motor carrier's franchise a bond from the seller conditioned for the payment of (1) taxes, (2) wages due employees of the seller, (3) unremitted C.O.D. collections due seller, (4) "for loss or damage of goods transported or received for transportation," (5) overcharge on property transported, and (6) for interline accounts to other carriers. *American Nat'l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963), decided prior to effective date of 1963 amendment.

Contract to Pay Claims for Which Assured Liable under Section Is Surety Contract.—That portion of a contract under which a company obligates itself to pay any shipper or consignee claims for which the assured would be liable by provision of this section, with stipulation that the assured should reimburse the company for any such payment, is a surety contract. *American Nat'l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963).

Findings Obviating Application of Subsection (d).—In a proceeding to obtain ap-

proval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings of the Commission supported by substantial evidence to the effect that the franchise carrier did not in fact obtain its franchise for the purpose of transferring it to another obviates the application of subsection (d) of this section. *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 269 N.C. 717, 153 S.E.2d 461 (1967).

Findings Supporting Conclusion That Transfer of Stock Is Justified.—In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings supported by evidence that the franchise carrier was conducting active operations under the franchise and that its ability to render service to the public within the limits of its franchise rights would not be adversely affected by the proposed transfer of its stock, support conclusions that the proposed sale of its stock is justified by the public convenience and necessity within the meaning of this section. *State ex rel. Utilities Comm'n v. Carolina Coach Co.*, 269 N.C. 717, 153 S.E.2d 461 (1967).

§ 62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.

(c) The failure of a common carrier or contract carrier of passengers or property by motor vehicles to perform any transportation for compensation under the authority of its certificate or permit for a period of 30 consecutive days shall be prima facie evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate or that the needs of a contract shipper are no longer served by such a contract carrier. Upon finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is authorized to find that the franchise is dormant and to cancel the certificate or permit of such common or contract carrier. The Commission in its discretion may give consideration in such finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, the efforts of the carrier to make its services known to the public or to its contract shipper, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be cancelled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. Any motor carrier who has obtained authority to suspend operations under the provisions of G.S. 62-112 (b) (5) and the rules of the Utilities Commission issued thereunder shall not be subject to cancellation of its franchise under this section during the time such suspension of operations is authorized. In determining whether such carrier has made reasonable efforts to perform service

under said franchise the Commission may in its discretion give consideration to disabilities of the carrier including death of the owner and physical disabilities. (1947, c. 1008, s. 23; 1949, c. 1132, s. 21; 1963, c. 1165, s. 1; 1967, c. 1201.)

Editor's Note. — The 1967 amendment, effective Jan. 1, 1968, added subsection (c).

As the rest of the section was not affected by the amendment, it is not set out.

Applied in *Jones v. State Farm Mut. Au-*

to. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Cited in *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

§ 62-114. Contract carriers; issuance of permits; terms and conditions.—When the Commission issues a permit to any contract carrier, it shall specify in the permit, or amendment thereto, the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under § 62-261 provided, that the permit shall list the name of all contract parties the carrier is authorized to serve, and no additions or substitutions of contracts shall be made without approval of the Commission, and the Commission may adopt rules and regulations limiting the number of contract parties served by a contract carrier so that contract carriers shall not hold themselves out to serve in the manner of common carriers. (1947, c. 1008, s. 13; 1949, c. 1132, s. 12; 1963, c. 1165, s. 1; 1967, c. 1094, s. 3.)

Editor's Note. — The 1967 amendment, effective Sept. 30, 1967, rewrote the proviso at the end of this section.

§ 62-118. Abandonment and reduction of service.—Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k). (1933, c. 307, s. 32; 1963, c. 1165, s. 1; 1971, c. 552, s. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 15, 1971, substituted "petition and notice" for "petition, notice and hearing" in the first sentence and added the second sentence.

Waste of a utility's manpower or other resources, with no substantial resulting benefit to the public, is not in the public interest and is not required. *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

A railroad may not be denied the right to curtail or abandon a service for which there is no substantial public need, even though, upon its entire business, the company is earning a fair rate of return. *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

Though prosperous, a railroad or other utility company may not be denied the right to effect economies in its operation, so as to increase its earnings, unless it may reasonably be found, upon the evidence before the Commission, that the public convenience and necessity requires the continuation of the service in question. An occasional inconvenience to a shipper, which is trivial in comparison with the saving to the railroad from the elimination of the service, will not suffice to show such public convenience and necessity. *State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R.*, 268 N.C. 242, 150 S.E.2d 386 (1966).

But It May Be Required to Keep Open Station Required by Public Convenience and Necessity.—A railroad may be required to keep a station open, with an agent in at-

tendance, if the public convenience and necessity requires such service, even though this can be done only at a loss to the railroad, provided such loss is not so great as to be unreasonable in comparison with the public's benefit from the service. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

And It May Not Substantially Reduce Hours Station Is Open without Commission's Order.—A liberal construction of §§ 62-2, 62-32, 62-131, 62-247, and this section, so as to effectuate the policy of the State as therein declared, compels the conclusion that when a railroad corporation has established and maintained a freight depot or passenger station pursuant to the order of the Commission, or has established and maintained for a year or more such depot or station on its own initiative, it may not, without first obtaining an order from the Commission authorizing it to do so, substantially reduce the number of hours per day during which such station shall be kept

open for the service of the public and attended by an agent of the railroad. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But Commission May Not Withhold Approval of Reduction Unreasonably.—When a railroad company applies for an order authorizing it to substantially reduce the number of hours per day during which a depot or station shall be kept open and attended by an agent, the Commission may not withhold its approval unreasonably and arbitrarily. It may deny such permission only after a hearing and only if it finds and concludes, upon competent, material and substantial evidence in view of the entire record, both that the public convenience and necessity requires the station or depot to be so kept open for a greater portion of the day, and that the railroad, by so doing, will not incur costs out of proportion to any benefit to the public. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

ARTICLE 6A.

Radio Common Carriers.

§ 62-119. Powers of Commission generally; definitions.—The North Carolina Utilities Commission shall exercise over and in relation to radio common carriers the powers conferred by this article.

- (1) The word "Commission" when used in this article means the North Carolina Utilities Commission.
- (2) The word "Commissioners" when used in this article means the Commissioners of the North Carolina Utilities Commission.
- (3) The term "radio common carriers" when used in this article includes every corporation, company, association, partnership and persons and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a radio common carrier engaged in the business of providing a service of one-way or two-way radio communications and licensed as a miscellaneous common carrier by the Federal Communications Commission, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service. The terms "telephone or telegraph utilities," "telephone or telegraph company," or a "person operating telegraph or telephone lines" when used in this chapter, shall not be construed as including radio common carriers. (1969, c. 766.)

Cited in State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§ 62-120. Certificate of convenience and necessity required; exceptions; rules and regulations.—No radio common carrier shall begin, or continue, the construction or operation of any radio system, or any extension thereof, or acquire ownership or control thereof either directly or indirectly without first obtaining from the Public Utilities Commission a certificate that the present or future public convenience and necessity requires or will require such construction,

operation or acquisition; provided this article shall not require, nor shall it be so construed as to require, any such carrier to secure a certificate for an extension within any authorized service area within which such person has heretofore lawfully commenced operations, or for any extension within or to territory already served by such carrier, necessary in the ordinary course of business, or for substitute facilities within or to any authorized service area or territory already served by such carrier, or for any extension into territory contiguous to that already served by such carrier and not receiving similar service from another such carrier when no certificate of convenience and necessity has been issued to or applied for by any other radio common carrier, or for the acquisition and operation of any plant or system heretofore constructed or hereafter constructed under authority of a certificate of convenience and necessity hereafter issued. The Commissioners are hereby authorized to prescribe appropriate and reasonable rules and regulations governing the issuance of such certificates. (1969, c. 766.)

§ 62-121. Issuance of certificate for carrier licensed by Federal Communications Commission.—Any person not presently franchised or certificated by the North Carolina Utilities Commission as a radio common carrier but engaged in the operation of any radio common carrier licensed by the Federal Communications Commission on June 11, 1969 shall receive a certificate of convenience and necessity from the North Carolina Utilities Commission authorizing such person to continue the operation of such radio common carrier in the territory professed to be served by such person on June 11, 1969, if, within thirty days after June 11, 1969, such person shall file with the Commission an application for such certificate, including copies of any license or licenses issued by the Federal Communications Commission to such person, showing the area professed to be served by such person. (1969, c. 766.)

§ 62-122. Commission may set and regulate rates.—The Commission shall have the power and authority to set and regulate rates charged to the public by radio common carriers. (1969, c. 766.)

§ 62-123. Granting of certificate for operation in established service area of another carrier.—The Commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof into the established service area which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonably adequate service. (1969, c. 766.)

§ 62-124. Article not applicable to mobile radio telephone service.—The provisions of this article relate only to "radio common carriers" as defined herein and are distinguishable from mobile radio telephone service offered by land line telephone or telegraph utilities regulated by the Commission. (1969, c. 766.)

Cited in *State ex rel. Utilities Comm'n v. Services Unlimited*, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder sub-

ject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Supervisory Power of Commission.—

An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

General Rate-Fixing Power.—

This section, in general terms, directs

§ 62-131. Rates must be just and reasonable; service efficient.

Cross Reference.—See note to § 62-118.

Purpose of Chapter.—The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in § 62-133. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Duty and Authority of Commission. — The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Duty of Utility to Render Adequate Service.—Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Necessity for Findings Showing Effect of Inadequacy on Decision Fixing Rates.—If the Commission found the quality of a utility's service to fall short of the requirement in this section that it be ade-

quate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under § 62-133 fixing rates which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Duty to Fix Rates.—

The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Utility Must Accept Responsibility.—A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The term "public utility" in subsection (b) includes a railroad corporation. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

§ 62-132. Rates established under this chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

Applied in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Stated in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

§ 62-133. How rates fixed.

(f) Unless otherwise ordered by the Commission subsections (b), (c), and (d) shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate of such natural gas. The Commission may permit such rate changes to become effective simultaneously with the effective date of the change in the wholesale cost of such natural gas, or at such other time as the Commission may direct. This subsection shall not prohibit the Commission from investigating and changing unreasonable rates in accordance with the provisions of this Chapter. The public utility shall give such notice, which may include notice by publication, of the changes to interested parties as the Commission in its discretion may direct. (1899, c. 164, s. 2, subsec. 1; Rev., s.

1104; C. S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 1092.)

Editor's Note.—

The 1971 amendment added subsection (f).

Only the subsection affected by the amendment is set out.

This section merely codified the former statute as interpreted by Supreme Court. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Purpose of Chapter.—The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The responsibility for fixing rates rests with the Utilities Commission and not on the Supreme Court. However, there is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

It is the prerogative of the Commission, and not the Court of Appeals, to decide the question as to what constitutes fair and reasonable rates that may be charged by a utility. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes upon it, not the Court of Appeals, the duty to fix the rates. State ex rel. Utilities Comm'n v. Morgan, 1 N.C. App. 576, 173 S.E.2d 479 (1970).

The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Neither the Supreme Court nor the Court of Appeals is authorized to fix rates for a public utility. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Commission Exercises Function of Legislative Branch of Government.—In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. It may not, therefore, exceed the limitations imposed upon the legislature by the State and federal Constitutions. The Commission, however, does not have the full power of the legislature but only that portion conferred upon it in this Chapter. State

ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

And Must Comply with Requirements of This Chapter.—In fixing the rates to be charged by a public utility for its service, the Commission must comply with the requirements of this Chapter. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Section prescribes formula which Commission is required to follow in fixing rates for service to be charged by a public utility. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

In order to assure the utility of earnings sufficient to attract capital and also in order to limit its charges for service to levels sufficient for that purpose, the legislature has prescribed in this section the steps which the Commission must take in fixing such charges. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Objective of Rate Making.—The fixing of rates for service which will enable the utility to do the things enumerated in subsection (b)(4), and no more, is the ultimate objective of rate making. At best, the result of the complex rate-making procedure is an approximation of this objective. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Rate making is, of necessity, a matter estimate and prediction since rates are set for the future. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

There is no fixed "fair rate of return" applicable to all utility companies, or to a single utility company at all times. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Manner of Arriving at Rate.—

In accord with 2nd paragraph in original. See State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Necessarily, what is a "just and reasonable" rate which will produce a fair return on the investment depends on (1) the value of the investment—usually referred to in rate-making cases as the rate base—which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a

just and reasonable rate of return on the predetermined rate base. When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

It is the duty of the Commission to arrive at an independent rate base upon consideration of all factors, including cost, replacement and trended cost, and it is its duty to exercise its independent judgment in doing so. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Commission Must Consider Requirements of Section in Arriving at Value of Property.—In arriving at the fair value of a public utility's property used and useful in providing the service rendered to its customers, the Commission is charged with the duty to consider the requirements set forth in this section, as well as other relevant factors. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Rates Fixed on Basis of Substantial Period of Time.—It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the persons served, is to fix rates on the basis of a substantial period of time. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Test Period Fixed to Estimate Revenues and Operating Expenses. — For the purpose of making the required estimates of the public utility's revenues and operating expenses, the customary and proper procedure is for the Commission to fix a test period of 12 months, ending, as close as practicable, before the opening of the hearing. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The actual experience of the company during the test period, both as to revenues produced by the previously established rates and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate pro forma adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period and, therefore, not in operation throughout its entirety. State ex rel.

Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Method of Taking Inflation and Rising Cost of Plant Additions into Account.—An accepted method of taking inflation and a rising cost of plant additions into account in rate making is to fix rates for service sufficient, presently, to bring to the company a rate of return, on its present rate base, slightly in excess of that which is necessary to meet the foregoing test of reasonableness. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Finding That New Rate Is Fair Is Tantamount to Finding That Existing Rates Were Inadequate.—The finding that a new rate represented a fair rate of return on the fair value of a company's utility property is tantamount to a finding that the existing rates were inadequate. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

No Change in Rates May Be Justified.—If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was fair, no change in the rates for service is justified. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Rate Reduction May Be Required. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was in excess of a fair rate of return, the statute requires the Commission to reduce the rates for service. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Commission Must Consider Quality of Service. — Subsection (d) of this section authorizes the Commission to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

The Commission may not lawfully ignore the duty imposed upon it by this section to consider the quality of service by reason of the company's poor service, nor does it discharge that duty by a mere statement that it has considered the matter, without showing the effect given to it. Such finding of conclusion is necessary to enable a reviewing court to determine whether the duty imposed by statute has been performed. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Serious inadequacy of service, found by the Commission upon substantial evidence, is one of the facts which the Commission

is required by this section to take into account in making a determination of rates. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Evidence of service deficiencies provide other material facts of record which the Commission is required to consider in making its determination as to what are just and reasonable rates for the quality of service which the applicant utility is providing its customers. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

And Customer Should Not Be Required to Pay for Inefficiency.—If a utility fails to provide adequate service on account of inefficient management, rates should not be permitted which would require the customer to pay for this inefficiency. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Commission Not Required to Ignore Inadequate Service.—It is not reasonable to construe subsection (b) of this section to require the Commission to shut its eyes to "poor" and "substandard" service resulting from a company's wilful or negligent failure to maintain its properties or to heed complaints from its subscribers when the Commission is called upon by the company to permit it to increase its rates for its inadequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

But Commission May Grant Rate Increase Notwithstanding a Finding That Service Was Poor.—In a hearing upon application by a telephone company for a rate increase in its franchise area, the Utilities Commission is authorized to grant the company an increase in the rates charged to its customers notwithstanding a finding by the Commission that the quality of service rendered by the company was poor and substandard. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

The Commission is not forbidden to grant a rate increase to a company whose service is inadequate, even though the inadequacy be due to a wilful or negligent failure by the company to perform its duty. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Assuming adequate findings of fact, supported by competent, substantial evidence, there is nothing in the provisions of this Chapter which makes it unlawful for the Commission, in the exercise of its sound administrative discretion, to conclude that

an increase in rates is warranted, notwithstanding existing service inadequacy due to the company's neglect of its properties, and that such increase is an appropriate step in the improvement of the service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Other Facts Which Commission Should Take into Account.—The legislature properly understood that at times other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in this section, and it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record to the end the utility may have them reviewed by the courts. In this respect it is, of course, immaterial whether the party seeking judicial review be the utility or its adversary. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Right to Consider "All Other Facts" Limited.—This section gives the Commission the right to consider "all other facts" that will enable it to determine what are reasonable and just rates, but this right is not a grant to roam at large in an unfenced field. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The ultimate question in determining appropriate rates is: What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future? The determination of this question is for the Commission, in accordance with the direction of this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

There Is But One Rate Base.—It is incorrect to speak of "the original cost rate base" and the "trended original cost rate base." There is but one rate base—the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, which value the Commission must determine as of the end of the test period. The original cost of the properties is simply evidence to be considered in making this determination. The replacement cost, whether determined by use of trended cost indices or otherwise, is also but evidence of the fair value of the properties. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v.

General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

The rate base should include working capital supplied by the company. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

But such rate base should not include funds supplied by its customers. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Overcharge to Investment Does Not Directly Affect Rate Base. — Only those purchases for operating materials and supplies, including current maintenance, are chargeable to operating expense, and purchases for plant construction go into an account for investment in plant, not to operating expense, so, an overcharge, if any, to investment in plant does not affect the net operating income. While such overcharge would improperly add to the account for original cost of the plant, which is an item to be considered in computing the rate base, it actually would not affect the rate base directly, since the rate base is the fair value of the plant, not the cost of it. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Necessity for Determining Fair Value of Utility's Property.—The first step prescribed by subsection (b)(1), that of ascertaining the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, becomes of critical importance in the rate-making process, for only after the determination of this rate base can judgment be intelligently exercised fixing the rate of return which the utility is entitled to receive on the fair value of its property and fixing rates to be charged by the utility which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Only Properties Used and Useful in Rendering Service Considered.—

The general doctrine is that the rate base is made up of values used in furnishing the service. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

This section clearly contemplates that only that property of the utility which is devoted to the public use for which the utility has been granted a franchise is to be considered, both in arriving at the fair value rate base and in projecting probable future revenues and expenses. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Question Whether Property Is "Used and Useful" Is One of Fact.—The question of whether specific property is presently "used and useful" in rendering service is one of fact to be determined by the Commission upon competent and substantial evidence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Property Not Presently Used to Its Full Capacity.—The fact that a transmission line, a building or a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently "used and useful" in rendering service. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

While central office equipment might have provided at the end of the test period capacity in excess of the amount needed at that moment, there being no question raised that it was not in operation at that time, it was at that time property both used and useful by the utility in providing services to the public, therefore the Commission had no authority to deduct any portion of its costs in arriving at the reasonable original cost of the property for consideration by it in making its ultimate determination of fair value. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Property Held for Future Use.—A telephone company, with central office equipment sufficient to serve any reasonably anticipated increase in customers, may not properly add to its rate base additional units of central office equipment merely because, in the long future, it hopes to have customers who will use it. This is especially true where the supplier of such equipment is an affiliated corporation, controlled by the same holding company which controls the telephone company. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

There is no merit in the contention that exclusion from the rate base of the value of property held by a public utility for future use amounts to confiscation of its property. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The question for determination in connection with an alleged overbuilding of a utility plant is whether the properties in question can be deemed "used and useful" in rendering the service, as of the end of

the test period. If not, they may not properly be included in the rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

A telephone plant under construction at the end of the test period is not property "used and useful" within the meaning of this section and is not to be included in the rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Value of Franchise Does Not Enter into Computation.—By § 62-110 the State has granted to the utility company a legal monopoly upon a service vital to the economic well-being and the domestic life of the people of a large territory. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise commands a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

"Fair Value."—A public utility is not entitled to rates which will enable it to earn a fair return on either the original cost or the replacement cost, per se. Although the sense in which the courts use the phrase "fair value" is less definite than it should be, it seems clear that the term does not cover money stupidly, extravagantly, or corruptly spent and if a utility has been seriously overbuilt, or its promoters have been seriously overpaid, the law does not intend that its customers shall be saddled with the payment of interest on the money thrown away. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The fair value of a new addition, when completed and in service, would almost certainly be found to be its total cost and, thereafter, would be found by considering such cost and the reproduction, or trended, cost, including interest during construction. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

"Fair value" is not the price for which the property could be sold as used or secondhand property. It is not the sale or exchange value of the entire business as a going concern. It is not the same as the fair value to be awarded by a jury in a condemnation case. The concept of "fair value," as used with reference to a public utility's rate base, is unique to rate making.

State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

"Replacement cost" and "fair value" are not synonymous. Nor is "fair value" an arithmetical average of original cost and replacement cost, less depreciation, nor is it to be ascertained by the application of any mathematical formula. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Ordinarily, the fair value of a utility's property is found to be less than the reconstruction cost of the property. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Factors to Be Considered in Determining Fair Value.—This section contemplates a weighing of (1) the reasonable original cost, less depreciation, (2) the replacement cost, which may be determined by trending such reasonable depreciated cost to current cost levels or by any other reasonable method, and (3) any other relevant factor, by the Commission in the exercise of its own expert judgment in determining "fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

This section contemplates that, normally, the Commission will ascertain the "fair value" of the properties at a point somewhere between the original cost, less depreciation, and the cost of replacement new, less depreciation. The Commission has the duty to weigh these evidences of "fair value" and may not disregard either, or brush either aside. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Reasonable Original Cost Is But One Factor.—The establishment of the reasonable original cost of the property, as referred to in subsection (b)(1), is of significance only because reasonable original cost is one of several figures and factors which the statute requires the Commission to consider in arriving at fair value. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Ordinarily, Price Actually Paid Is Considered Reasonable Original Cost.—Where a public utility's property has been purchased from a stranger, ordinarily the price actually paid by the utility would be considered its reasonable costs, though it would not necessarily be so. Even in such a case the Commission may find that the management of the utility acted improvidently or carelessly and paid a price greater than reasonable. State ex rel. Util-

ities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

But a utility may not inflate its rate base by extravagance in purchasing equipment or constructing its plant. In this connection, it is immaterial whether such extravagance be due to careless improvidence or to wilful payment of exorbitant prices to an affiliate. On the other hand, the management of the business of a public utility, including the fixing of the prices which it pays for the construction and equipment of its plant and for its maintenance and operation, rests with its board of directors in the absence of clear mismanagement or abuse of discretion. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Determining Reasonable Original Cost of Property Sold to Utility by Affiliated Corporation.—In determining the rate base, the fact that equipment or services are sold to the utility by an affiliated corporation does not alter the ultimate question for the Commission. That question is whether the prices paid by the utility are reasonable and, therefore, reflect the "reasonable original cost" of the properties. The only effect of the affiliation between the utility and its supplier is that such relationship calls for a close scrutiny by the Commission of the price paid by the utility. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

In cases in which a substantial portion of a utility's property was acquired by purchase from an affiliated company, it becomes obligatory upon the Commission to scrutinize the prices paid and, to the extent it finds such prices unreasonable, to make adjustments in the utility's figures accordingly. This is all the more true where the affiliated supplier so dominates the market that its pricing policies may not be sufficiently controlled by normal competition. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

For purposes of determining a utilities rate base, when considering a purchase made from an affiliated company, the bargaining is not at arm's length and when the transaction is called in question, the burden is upon the utility to show that the price it paid was reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Where the prices paid by a telephone company to an affiliated manufacturing company are the same as those which the manufacturing company charges other affiliated companies to which it makes a

majority of its sales, the Utilities Commission could properly determine the reasonableness of the prices charged by the manufacturing company by comparing its rate of return on common equity with the rates of return experienced by other manufacturing companies operating in similar fields. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Fixing Fair Value at Original Cost Plus Six Percent.—In a telephone rate case, the Utilities Commission's finding of the fair value of the telephone company's property by first determining original cost and then increasing that figure by six percent was unsupported by competent, material and substantial evidence in the record and was arrived at by a method which failed to comply with the directives contained in subsection (b)(1). State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Discounting Replacement Cost for Depreciation.—In determining "fair value," the Commission may discount the replacement cost new by the same percentage as that indicated by the total accumulated depreciation in arriving at the replacement cost factor, or, if there is evidence to support such a finding, may discount replacement cost new by a greater or a smaller amount on account of depreciation, including obsolescence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Excess of Fair Value over Original Cost Less Depreciation to Be Included in Rate Base.—This section contemplates that the excess of "fair value," ascertained by the Commission, over and above the original cost, less depreciation, shall be included in the rate base of the utility, just as if it were a realized profit invested in additional property used and useful in rendering service to the public. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Excess of Fair Value over Total Capital of Company.—The excess of "fair value" over the actual total capital of the company (debt capital, plus capital stock, plus actual surplus) is to be added to the equity component of the capital structure for the purpose of fixing rates under this section. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Subtraction of Appropriate Amount for Excess Plant Margins.—The Commission may subtract from original cost and from replacement cost an appropriate amount for excess plant margins. State ex rel. Util-

ities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Subtraction for Inadequacy of Plant.—

The Commission may subtract from both original cost new and replacement cost new an appropriate allowance for the inadequacy of the plant, if any, due to faulty engineering, faulty maintenance or other circumstance. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Subtraction for Consistently Poor Service.—Consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present "fair value" of the properties. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Present "Fair Value" of Telephone Properties.—Neither the original cost nor the reproduction cost may properly be taken as the present fair value of telephone properties which were improperly engineered, have not been properly maintained, and are consequently in need of extensive rehabilitation. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Determination of Local Rates for Telephone Company.—In determining the local rates for a telephone company, it was improper for the Utilities Commission (1) to include in the rate base the value of the company's telephone plant that was under construction at the end of the test period but which was not yet in operation and (2) to add the interest charged during construction to the company's operating income. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

In determining the local rates for a telephone company, the amounts paid to the company by its customers as a result of the company's practice of billing the customers one month in advance is not creditable to the company's working capital requirements. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Fair Rate of Return Test.—In this State the test of a fair rate of return is that laid down by the Supreme Court of the United States in the Bluefield Water Company case, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923); that is, if the company continues to earn such a rate of return, will it be able to attract on reasonable terms the

capital it needs for the expansion of its service to the public? State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Anticipated Rate of Return.—Adjusted revenue deductions are subtracted from adjusted revenues to determine what net operating income the company may anticipate under the previously established rates, in a period of the same length as the test period, during which all presently known conditions prevail. Such net operating income, divided by the rate base, gives the rate of return which the company may anticipate, on its properties used in rendering its service, under the previously established rates for service, in a period of the same length as the test period, throughout which all presently known conditions prevail. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Meaning of Subsection (c).—The clear meaning of subsection (c) is that the company's property which is "used and useful in providing the service rendered to the public" is to be determined "as of the end of the test period." State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Subsection (c) clearly provides that the Commission is to include in the probable future revenues of the company only those revenues based on the plant and equipment in operation at the end of the test period. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Plant under Construction Excluded from Rate Base.—There is no unfairness to the utility company in excluding plant under construction from the rate base. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Since plant under construction at the end of the test period contributed nothing whatever to the revenues produced during that test period, to add the value of such plant, still under construction, to the rate base, without a pro forma adjustment to operating revenues and operating revenue deductions, would, necessarily, depress the rate of return, and this would be unfair to the ratepayers. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

A generating plant of a power company, half-completed at the end of the test period, or a half-completed line of telephone wire, cannot be deemed property "used in providing the service" "as of the end of the test period used in the hearing." Neither can it be deemed property "useful" in

rendering the service at that time. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

When an addition to plant begins to serve the public, the utility is entitled then to begin to earn a fair return on that portion of its total investment, just as it does on the remainder of the plant, but it is not entitled to earn a return on its investment in the plant addition before the plant addition is completed and begins to serve the public. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

It was error for the Commission to make a pro forma adjustment to revenues, by adding to the actual revenue earned in the test period the item called "interest charged to construction," since the plant under construction was not in operation at the end of the test period. *State ex rel. Utilities Comm'n v. Morgan*, 27 N.C. 235, 179 S.E.2d 419 (1971).

It was error for the Commission to include in the rate base of a public utility the value of plant under construction at the end of the test period. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

When the addition to plant is completed and put into service, the entire cost of it, including the cost of capital incurred in construction, is added to the rate base of the company. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

Value of Property Determined as of End of Trial Period.—The Commission is required under subsection (c) to determine the fair value of the utility's property as of the end of the trial period based on the plant and equipment in operation at that time. *State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co.*, 266 N.C. 450, 146 S.E.2d 487 (1966).

The value of plant and service must be determined as of a specific date—the end of the test period—and not by averaging a group of periods or months within a period. *State ex rel. Utilities Comm'n v. Morgan*, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Error to Add Interest Charged to Construction to Operating Revenue.—It was error for the Commission to add to the company's operating revenue for the test period interest charged to construction during the test period. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

Less Than Fair Rate of Return Requires Commission to Raise Rates.—If the rate of

return derived from the previously established rates during the test period, adjusted pro forma, was less than a fair rate of return, this section requires the Commission to raise the company's rates for service, assuming that the quality of service is adequate. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

Adjustments for Changes in Conditions During Test Period.—Operating revenue deductions (operating expenses, depreciation, taxes and all other proper deductions from revenue) for expenditures actually made in the test period are adjusted, pro forma, for changes in conditions during the test period, such as an increase in the wage rate, so that the result reflects what would have been the total of such deductions had the conditions, prevailing at the end of the test period, prevailed throughout it. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

Pro forma adjustments to revenue are made to reflect what the revenues would have been in the test period, which is usually 12 months, had present conditions prevailed throughout that period, so that the result shows what revenues will be produced in 12 months by application of the previously established rates for service conditions existing at the end of the test period; i.e., at the date, nearest the present, for which data are available. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

The basic, underlying theory of using the company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is that rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, adjusted for known changes in conditions. *State ex rel. Utilities Comm'n v. Morgan*, 278 N.C. 235, 179 S.E.2d 419 (1971).

Transactions between Utilities and Affiliated Supply Companies.—It is the duty of the Commission to look closely at transactions between utility operating companies and affiliated supply companies to be sure that the public is not required to pay rates based on excessive costs resulting from excessive profits earned by an unregulated supplier. *State ex rel. Utilities Comm'n v. Morgan*, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

It is for the Commission to determine what weight to give to the evidence in a

record as to replacement cost. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Having made the findings, properly supported, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

A reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Having made findings of the original cost less depreciation and replacement cost less depreciation, the weight to be given those figures in reaching the ultimate finding of fair value is to be determined by the Commission, not by the reviewing court. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Commission must consider and weigh testimony of expert witnesses, on the question of the fair rate of return, in the light of its own adjustment, for rate-making purposes, of the utility's actual capital structure by its determination of the "fair value" of its properties. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Reversing Determination of Commission.—The Commission's determination, reached pursuant to the mandate of this section and to the statutory procedural requirements, may not be reversed by the Court of Appeals or by the Supreme Court merely because it would have reached a different conclusion upon the evidence, but it is otherwise if it does not appear from the order of the Commission that the statutory mandates have been obeyed. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Trended Cost Evidence Deserves Weight.—In these times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. The objections to such evidence apparently came from jurisdictions where the base rate is fixed at "book value" or "original cost" rather than present value. Of course, the book value or original cost can be ascertained with exactness from the books and records. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

In these times of increased construction costs and decreased dollar value, trended costs evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

When Necessary to Fix Present Value and Replacement Is Expensive.—Trended cost is useful only when it becomes necessary to fix the present value of facilities constructed when the cost was low and replacement has become expensive. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Although Such Evidence Is Not Conclusive.—The trended cost takes into account the type of facility, its age, its original and replacement cost, terrain, location, its probable useful life, and other factors. Such evidence is not conclusive but it does appear to be a useful guide in determining value of facilities. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Specific and unambiguous factual findings by the Commission are necessary to enable a reviewing court to determine whether the duty imposed by § 62-131 has been performed. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Material Issues of Fact upon Which Commission Must Make Findings.—When the record before the Commission presents the questions of the original cost, less depreciation, and the replacement cost, less depreciation, these are material issues of fact, upon each of which the Commission must make its finding. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Where evidence of original cost, less depreciation, and of replacement cost, less depreciation, is introduced, the Commis-

sion must make, and set forth in its order, its findings as to both of these evidential facts, along with any "other facts" considered by it. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

"Other facts" which the Commission considered in determining the "fair value" of the utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as "relevant to the present fair value." *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Declaration That Commission Followed No Formula in Finding Fair Value.—A finding of "fair value" by the Commission is not rendered immune to judicial review by the Commission's declaration that, in reaching such finding, it follow no formula. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

The mere recital by the Commission that it has considered all of the factors prescribed by this section in arriving at its ascertainment of "fair value" does not preclude the reviewing court from setting aside the finding of "fair value" where the record discloses that the Commission in fact failed to do so. *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Necessity for Finding of Replacement Cost.—While the consideration or weight to be given replacement cost, depreciated, in ascertaining "fair value" rests in the sound discretion of the Commission, the reviewing court cannot satisfactorily determine whether the Commission considered or weighed this element at all, or merely gave it minimal consideration, unless the Commission set forth what it found this element to be. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Without a finding by the Commission of the replacement cost of a public utility's properties "used and useful in providing the service," the Commission's finding of "fair value" was affected by an error of law and, consequently, its finding of a fair rate of return on such "fair value" was so affected and was premature. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Findings Relating to Inadequacy of Service Required.—If the Commission found the quality of utility's service to fall short of the requirement in § 62-131 that it be adequate, efficient and reasonable, then the

Commission should make specific findings showing the effect of any such inadequacy upon its decision under this section fixing rates which are fair both to the public utility and to the consumer. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 12 N.C. App. 598, 184 S.E.2d 526 (1971).

When Commission's Finding of Fair Value May Be Set Aside for Errors of Law.—The determination of the weight to be given each factor in its ascertainment of "fair value" is for the Commission, not the reviewing court. But if it is clear from the record that the Commission reached its finding of "fair value" by disregarding or giving minimal consideration to one of the enumerated factors, its finding of the ultimate fact of "fair value" may be set aside by the court on the ground of error of law in such ascertainment. Similarly, the finding of "fair value" may be set aside by the reviewing court if it clearly appears that the Commission has made its determination thereof by giving weight to a factor as to which there is no substantial evidence in the record. It is likewise where the order of the Commission shows that it reached its determination of "fair value" by considering unspecified facts other than original cost and replacement cost depreciated. The mere recital by the Commission that it has considered all of the factors prescribed by this section in arriving at its ascertainment of "fair value" does not preclude the court from setting aside the finding of the "fair value" where the record discloses any of these errors of law. *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

In fixing intrastate rates, etc.—

When a company operates in two or more states, the operations are treated as separate businesses for the purpose of rate regulation. *State ex rel. Utilities Comm'n v. Lee Tel. Co.*, 263 N.C. 702, 140 S.E.2d 319 (1965).

The reasonableness of the rates to be fixed by the State must be decided with reference exclusively to what is just and reasonable in respect of domestic business. *State ex rel. Utilities Comm'n v. Lee Tel. Co.*, 263 N.C. 702, 140 S.E.2d 319 (1965).

An inadequate return in Virginia would not of itself justify a rate increase in North Carolina, nor would a high rate of return in Virginia justify less than a fair and reasonable rate in North Carolina. *State ex rel. Utilities Comm'n v. Lee Tel. Co.*, 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission is empowered and directed to make reasonable and just rates as applied to the distribution and sale

of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there, or the dealings between private parties. To hold otherwise would, in its practical operation, be to withdraw or nullify the powers that this section professes to confer and should not for a moment be entertained. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission of this State does not have the right to fix less than a reasonable or fair rate of return on a telephone company's investment in North Carolina because the utilities commission in Virginia may have fixed rates in Virginia which, in the opinion of the Utilities Commission in this State, gives the company a reasonable return on its entire properties

when its Virginia and North Carolina revenues are combined. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Reasonableness of Rate of Return Depends on Whether Property Is Fairly Valued.—Whether a 4%, 5%, or 6% return is just and reasonable depends very largely on whether the Commission has placed a fair value on the property of the utility which is used and useful in producing its revenue. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Cited in *In re North Carolina Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

§ 62-134. Change of rates; notice; suspension and investigation.

(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

(1971, c. 551.)

Editor's Note. — The 1971 amendment substituted "new or revised rate or rates" for "new rate or rates" in the first sentence of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Petition Determined on Basis of Facts Existing When Increase Effective.—The Utilities Commission must determine a petition for an increase in telephone rates on the basis of the facts existing at the time such increase is effective. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

And Commission Cannot Consider Subsequent Events.—The Utilities Commission cannot consider events occurring subsequent to the date certain rates went into effect, to ascertain what were proper rates on that date. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel.

Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

New Rate on Changed Conditions Relates to Date of Change.—If a subsequent change in conditions warrants a new rate, such new rate must relate to the date of change. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

And Parties Must Be Given Hearing on Effect of Change.—The parties must be accorded an opportunity to be heard with respect to the effect, if any, a subsequent change in conditions had on the rate structure, and a denial of such opportunity would be a deprivation of due process. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Transfer of Exchanges during Pendency of Petition.—Where a telephone company, during the pendency of its petition for an increase in rates, transfers part of its exchanges to a subsidiary, the Utilities Com-

mission in the exercise of its discretion, may make the subsidiary a formal party and treat the original petition as a joint petition for a uniform system of rates; or it may make the subsidiary a party and fix proper rates for the subsidiary's exchanges and for the original petitioner's exchanges. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Language of Subsection (b) Is Permissive.—While the language of subsection (b) gives the Commission authority to suspend changes in rates subject to the time limitation imposed, it does not require that it do so. The language is permissive, not mandatory. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Suspension of Rates May be Withdrawn or Modified.—Nothing in this section indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard so as thereafter to be precluded from withdrawing or modifying the suspension. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

The authority to suspend rates for not more than 270 days clearly includes the power to suspend them for some lesser period. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Suspension Procedure When New or Revised Rate Filed with Commission.—

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

The Commission may not fix rates retroactively so as to make them collectible for past service. State ex rel. Utilities Comm'n

It is entirely consistent with the statutory procedure contemplated by this section that upon the filing with it by a utility of a new or revised rate, the Commission, if it does exercise its discretion to suspend such rate, shall (1) act promptly and suspend the rate for up to the maximum period it is permitted to do so; (2) hold a preliminary hearing, if the Commission should deem this desirable, to receive additional evidence and information; and (3) in the clearer light furnished by the additional information so acquired, reconsider its original order and either modify it or cancel it altogether. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

The Utilities Commission had authority to enter an interim order allowing a power company's initially requested rate increase to go into effect pending final determination of the case, subject to the refund with interest of any portion of the increase ultimately determined to be excessive. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Applied in State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 453, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d (1972).

v. City of Durham, 282 N.C. 308, 193 S.E.2d 580 (1972).

Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

§ 62-137. Scope of rate case.

Applied in State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utilities

§ 62-138. Utilities to file rates, service regulations and service contracts with Commission; publication.

(f) Under such rules as the Commission may prescribe, every electric membership corporation operating within this State shall file with the Commission, for information purposes, all rates, schedules of rates, charges, service regulations, and forms of service contracts, used or to be used within the State, and shall keep copies of such schedules, rates, charges, service regulations, and contracts open to public inspection. (1899, c. 164, s. 7; Rev., s. 1109; 1907, c. 217, s. 5; C. S., s. 1074; 1933, c. 134, s. 8; c. 307, s. 4; 1941, c. 97; 1947, c. 1008, s. 25; 1949, c. 1132, s. 23; 1959, c. 209; 1963, c. 1165, s. 1; 1965, c. 287, s. 7.)

Editor's Note. — The 1965 amendment added subsection (f). the amendment, the rest of the section is not set out.

As only subsection (f) was affected by

§ 62-140. Discrimination prohibited.

(c) No public utility shall offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of such utility service except upon filing of a schedule of such compensation or consideration or equipment to be furnished and approval thereof by the Commission, and offering such compensation, consideration or equipment to all persons within the same classification using or applying for such public utility service; provided, in considering the reasonableness of any such schedule filed by a public utility the Commission shall consider, among other things, evidence of consideration or compensation paid by any competitor, regulated or nonregulated, of the public utility to secure the installation or adoption of the use of such competitor's service. Provided, further, that nothing herein shall prohibit a public utility from carrying out any contractual commitment in existence at the time of the enactment hereof, so long as such program does not extend beyond December 31, 1963. For the purpose of this subsection, "public utility" shall include any electric membership corporation operating within this State, and the terms "utility service" and "public utility service" shall include the service rendered by any such electric membership corporation. (1899, c. 164, s. 2, subsecs. 3, 5; Rev., s. 1095; 1913, c. 127, s. 6; C. S., s. 1054; 1933, c. 134, s. 8; c. 307, s. 6; 1941, c. 97; 1963, c. 1165, s. 1; 1965, c. 287, s. 8.)

Editor's Note.—

The 1965 amendment added the last sentence in subsection (c).

As only subsection (c) was affected by the amendment, the rest of the section is not set out.

Subsection (a) is similar to § 3 of the Interstate Commerce Act. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Common Law.—

The duty now imposed by this section upon privately owned distributors and sellers of electric power not to discriminate in service or rates is merely a development of the common-law obligation of equal and undiscriminating service. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

But Rates May Differ under Varying Conditions. — The charging of different rates for service rendered under varying conditions and circumstances is not unlawful. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Provided Differences in Service or Conditions Are Substantial. — There must be substantial differences in service or conditions to justify difference in rates. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Any Substantial Ground for Distinguishing between Customers Is Material Factor. — Any matter which presents a substantial

difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material factor in the determination of rates. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Rates for Shipments from Different Origins Need Not Be Equal.—

Subsection (a) of this section does not require an equality of rates where the shipments are from different points of origin to the same destination even though the distances be equal or approximately so. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Difference in Service among Customers in the Same Municipality. — The fact that a power company which is a "secondary supplier" directly serves seven customers within a municipality pursuant to the provisions of § 160A-332 but does not directly serve other customers within the municipality does not constitute an "unreasonable preference or advantage" within the meaning of this section. State ex rel. Utilities Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

Right of City to Refuse Service Is Same as Private Company's. — The right of a municipal corporation operating a plant for the distribution and sale of electricity to its inhabitants to refuse to serve is neither greater nor less than that of a privately owned electric power company to do so. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

City May Not Deprive Inhabitant of Service to Compel Obedience to Police Regulations. — A city may not deprive an

inhabitant, otherwise entitled thereto, of light, water, or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise

enforceable those regulations may be. *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967).

§ 62-146. Rates and service of motor common carriers.

"Operating Ratios".—The operating ratios for the movement of tobacco in intrastate traffic cannot be determined with mathematical exactitude. But the carriers can no doubt approximate the rateable proportion of their operating ratios from tobacco movements in intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact and to issue such orders as the findings of fact may warrant. *State ex rel. North Carolina Util. Comm'n v. Attorney Gen.*, 2 N.C. App. 657, 163 S.E.2d 638 (1968).

An operating ratio of 100% means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. *State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n*, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

An operating ratio of one hundred percent means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. When the oper-

ating ratio exceeds one hundred percent, it means that the expenses exceed the revenues. The lower the operating ratio, the more profitable the operation is to the carrier. *State ex rel. North Carolina Util. Comm'n v. Attorney Gen.*, 2 N.C. App. 657, 163 S.E.2d 638 (1968).

Basis for Determination of Ratios.—A determination of intrastate operating ratios must be based on revenues and expenses incurred in North Carolina alone, and where ratios do not reflect an actual separation of intrastate and interstate revenues and expenses, a rate increase based thereon cannot be sustained. *State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n*, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

Carriers have legal right to contract inter se, and the law encourages cooperation and agreements between them respecting their service to the public. *State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co.*, 261 N.C. 384, 134 S.E.2d 689 (1964).

§ 62-153. Contracts of public utilities with certain companies and for services.

Affiliate Company Cannot Be Used to Transmit Unreasonable Profits to Parent Company.—The Commission cannot permit parent holding companies to use affiliate companies as a device for transmitting an unreasonable level of profits to such parent holding company from goods or

services supplied the operating company by way of an affiliate company. *State ex rel. Utilities Comm'n v. Morgan*, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Stated in *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

ARTICLE 9.

Acquisition and Condemnation of Property.

§ 62-180. Use of railroads and public highways.

Cross Reference.—As to power of county to condemn property already devoted to public use and owned by a public service corporation, see § 153A-160.

§ 62-183. Grant of eminent domain; exception as to mills and water powers.

Editor's Note.—

For article on remedies for trespass to

land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

§ 62-187. Proceedings as under eminent domain.

Applied in *Carolina Power & Light Co. v. Briggs*, 268 N.C. 158, 150 S.E.2d 16 (1966); *Duke Power Co. v. Parker*, 18 N.C. App. 242, 196 S.E.2d 553 (1973).

§ 62-190. Right of eminent domain conferred upon pipeline companies; other rights.

Editor's Note.—

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Determining Market Value. — In determining market value where a gas company has taken land for a pipeline, consideration of future uses to which the property is adapted and which are precluded by the taking, should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or

speculative value should not be considered. *Public Serv. Co. v. Kiser*, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

Measure of Damages.—The measures of damages to which the landowners were entitled for the taking of the easement by a gas company was the difference in the fair market value of the land immediately before the taking as compared to the fair market value of the land immediately after the taking. *Public Serv. Co. v. Kiser*, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

ARTICLE 11.

Railroads.

§ 62-220. Powers of railroad corporations.

(1) To Survey and Enter on Land.—

Editor's Note.—For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

(2) To Condemn Land under Eminent Domain.—

Editor's Note.—

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

A railroad corporation has the power of eminent domain under §§ 40-2(1) and 40-5. *North Carolina State Hwy. Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

When a railroad corporation obtains land in condemnation proceedings it procures merely an easement to be used only for

railroad purposes. Condemnation is not to be used as a means of acquiring property for the benefit of the corporation. It has no right or authority to use or let the property for private or nonrailroad purposes. Such a right-of-way is an easement for railroad purpose and does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes. *North Carolina State Hwy. Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

(4) To Purchase and Hold Property.—

A railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the

powers contained in the charter or arising to it under the general laws. *North Carolina State Hwy. Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272. (1972).

§ 62-223. Intersection with highways.

Editor's Note. — For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Stated in *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).

§ 62-224. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.

A railroad grade crossing is in itself a warning of danger. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590 (1968).

Duty to Maintain, etc.—

The duty of a railroad company with re-

spect to the maintenance of a crossing over its track, where its track has been constructed over an established road, whether public or private, is well settled. The duty is prescribed by this section and has been recognized and enforced by the Supreme

Court in numerous decisions. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590 (1968).

Duty of Traveler to Exercise Due Care.

—A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590 (1968).

Reciprocal Duty to Keep Proper Lookout and Exercise Care.—In approaching a grade crossing, both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590 (1968).

Yielding Right-of-Way.—Where a railroad track crosses a public highway, though a traveler and a railroad have equal rights to cross, the traveler must yield the right-of-way to the railroad company

in the ordinary course of its business. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590 (1968).

Highway Commission May Require Railroad to Widen Crossings.—Section 60-43, prior to its repeal and reenactment as this section, empowered the Highway Commission, upon the widening of a highway, to require a railroad company to widen its highway crossings so as to conform to the increased width of the highway. *Atlantic Coast Line R.R. v. State Highway Comm'n*, 268 N.C. 92, 150 S.E.2d 70 (1966).

And Is Not Subject to Suit for Railroad's Costs in Widening.—The State Highway Commission is not subject to suit on the theory of unjust enrichment to recover costs incurred by a railroad company in widening its grade crossings pursuant to lawful order of the Highway Commission, there being no contention of any "taking" by the Commission, since there is no statutory provision authorizing suit in such instance, and the right to bring a common-law action against the Highway Commission where there is no statutory remedy is applicable solely where there has been a "taking" of property by the Commission. *Atlantic Coast Line R.R. v. State Highway Comm'n*, 268 N.C. 92, 150 S.E.2d 70 (1966).

§ 62-231. Union depots required under certain conditions.

Editor's Note.—For an article urging revision and recodification of North Car-

olina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

§ 62-237. To regulate crossings and to abolish grade crossings.

State Policy in Allocating Cost of Grade Crossing Improvements.—Although § 136-20 and this section may indicate a legislative trend in the field of allocating costs of grade crossing improvements, these statutes fall short of establishing a State policy applicable to factual situations other than those to which they relate in express and specific terms. *Southern Ry. v. City of Winston-Salem*, 275 N.C. 465, 168 S.E.2d 396 (1969).

When Section Does Not Apply.—This section does not apply where "the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System" is not involved. *Southern Ry. v. City of Winston-Salem*, 275 N.C. 465, 168 S.E.2d 396 (1969).

§ 62-247. Commission to establish and regulate stations for freight and passengers; abandonment of station or other facility or diminution of accommodations.

(c) A railroad company which has established and maintained for a year or more a passenger station, freight depot, team track, or other facility for serving the public at a point upon its road or route shall not abandon such station, depot or team track or other facility for serving the public nor substantially diminish the accommodations at said station, depot or team track by the stopping of trains or otherwise except by approval of the Commission which may be sought by the filing of an appropriate petition seeking the necessary authority. Freight or passenger depots may be relocated upon the written approval of the Commission. (1899, c. 164, s. 2, subsecs. 12, 13, ss. 19, 20; Rev., ss. 1097, 1098; 1913, c. 155; C. S.,

ss. 1040, 1041, 1051; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 552, s. 2.)

Cross Reference.—

See note to § 62-118.

Editor's Note. — The 1971 amendment, effective Oct. 15, 1971, rewrote subsection (c).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

ARTICLE 12.

Motor Carriers

§ 62-259. Additional declaration of policy for motor carriers.

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission. — The Commission must make its own independent investigations, determinations and

findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

§ 62-260. Exemptions from regulations.—(a) Nothing in this Chapter shall be construed to include persons and vehicles engaged in one or more of the following services by motor vehicle if not engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation:

- (1) Transportation of passengers or property for or under the control of the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State;
- (2) Transportation of passengers by taxicabs when not carrying more than nine passengers or transportation by other motor vehicles performing bona fide taxicab service and not carrying more than nine passengers in a single vehicle at the same time when such taxicab or other vehicle performing bona fide taxicab service is not operated on a regular route or between termini; provided, no taxicab while operating over the regular route of a common carrier outside of a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in (8) of this subsection, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers;
- (3) Transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations;
- (4) Transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft;
- (5) Transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service;
- (6) Transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services or transportation of pupils and employees to and from private or parochial schools or transportation to and from functions for students and employees of private or parochial schools;
- (7) Transportation of bona fide employees of an industrial plant to and from their regular employment;

- (8) Transportation of passengers when the movement is within a municipality exclusively, or within contiguous municipalities and within a residential and commercial zone adjacent to and a part of such municipality or contiguous municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone;
- (9) Transportation in bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair;
- (10) Transportation of newspapers;
- (11) Transportation of insecticides, fungicides and the ingredients thereof; transportation of farm, dairy or orchard products from farm, dairy or orchard to warehouse, creamery, or other original storage or market;
- (12) Transportation for and under the control of cooperative associations organized and operating under the Federal Agricultural Marketing Act, U.S.C.A. Title 12, § 1141(j), or under the State Cooperative Marketing Act, Chapter 54, Subchapter V, General Statutes of North Carolina, as amended, or for any federation of such cooperative associations; provided, such federation possesses no greater powers or purposes than such cooperative associations;
- (13) Transportation of livestock, or fish, including shellfish and shrimp, but not including manufactured products thereof;
- (14) Transportation of raw products of the forest, including firewood, logs, crossties, stave bolts, pulpwood, and rough lumber, but not including manufactured products therefrom;
- (15) Pickup, delivery, and transfer service for railroads, express companies, water carriers and motor carriers in connection with their respective line-haul services within the commercial zone of any municipality, as defined by the Commission between their terminals and places of collection or delivery of freight;
- (16) Transportation by a bona fide private carrier, as defined in G.S. 62-3(22);
- (17) Transportation of any commodity anywhere of a character not hauled in the ordinary course of business by a common carrier by motor vehicle.

(f) Notwithstanding the exemptions for transportation of passengers and property provided under subsections (a) through (e) of this section, all motor carriers transporting passengers for compensation under said exemptions or under any special exemptions granted by the Utilities Commission under G.S. 62-261 as are established for regulated motor common carriers by the rules of the Utilities Commission pursuant to G.S. 62-268, and all such motor carriers transporting for hire under said exemption provisions shall further be subject to the same requirements for safety of operation of said motor vehicles as are required of regulated motor common carriers under the provisions of this Chapter and the regulations of the Commission adopted pursuant thereto. The Commission is authorized to promulgate rules and regulations for the enforcement of said requirements in the case of all such exempt operations, and the officers and agents of the Commission shall have full authority to inspect said exempt vehicles and to apply all enforcement regulations and penalties for violation of said security regulations and safety regulations as in the case of regulated motor carriers.

(g) The owners of all motor vehicles used in any transportation for compensation which is declared to be exempt under this section shall register such operation with the Utilities Commission and shall secure from the Utilities Commission a certificate of exemption. (1947, c. 1008, s. 4; 1949, c. 1132, s. 5; 1951, c. 987, s. 1; 1953, c. 1140, s. 2; 1955, c. 1194, ss. 1, 2; 1959, c. 102, c. 639, s. 14;

1963, c. 1165, s. 1; 1967, cc. 1135, 1203; 1969, c. 681; 1971, cc. 856, 1192; 1973, c. 175.)

Editor's Note.—The first 1967 amendment, effective Feb. 15, 1968, added subsection (f). The second 1967 amendment added subsection (g).

The 1969 amendment, effective Sept. 15, 1969, substituted "nine (9)" for "six (6)" in two places in subdivision (2) of subsection (a).

The first 1971 amendment repealed former subdivision (1) of subsection (a), which exempted transportation of passengers or property for or under the control of the United States, the State, or any political subdivision thereof, or any State board, department, commission or institution.

The second 1971 amendment added the language following "religious services" in subsection (a)(6).

Editor's Note.—

The 1973 amendment added present subdivision (1) to subsection (a).

As the rest of the section was not affected by the amendments, it is not set out.

Franchise for Limousine Service to Air-

port.—The provisions of §§ 63-2, 63-49, 63-50, 63-53, and this section authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. *Harrelson v. City of Fayetteville*, 271 N.C. 87, 155 S.E.2d 749 (1967).

Rate Scheme Held Unconstitutional.—The state regulatory scheme by which Utilities Commission sets rates for franchised carriers to charge the U.S. Army in transportation of household goods violates the national procurement policy and is an unconstitutional burden on the United States in the exercise of its constitutional powers. *United States v. North Carolina Util. Comm'n*, 352 F. Supp. 274 (E.D.N.C. 1972).

Cited in State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); *State ex rel. Utilities Comm'n v. J.D. McCotter, Inc.*, 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973).

§ 62-261. Additional powers and duties of Commission applicable to motor vehicles.—The Commission is hereby vested with the following powers and duties:

- (3) To prescribe qualifications and maximum hours of service of drivers and their helpers, and rules regulating safety of operation and equipment; and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the State with respect to maximum hours of service of vehicle drivers and their helpers, and safety of operation and equipment, the Utilities Commission may adopt and enforce the rules and regulations adopted and promulgated by the United States Department of Transportation with respect thereto, insofar as the Utilities Commission finds the same to be practical and advantageous for application in this State and not in conflict with this article. In order to promote safety of operation of motor carriers, the Utilities Commission may avail itself of the assistance of any other agency of the State having special knowledge of such matters and it may make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of vehicles upon the highways.
- (4) For the purpose of carrying out the provisions of this Article, the Utilities Commission may avail itself of the special information of the Board of Transportation in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the Board of Transportation, upon request of the Utilities Commission, shall furnish such information.
- (7) The Commission and its duly authorized inspectors and agents shall have authority at any time to enter upon the premises of any motor carrier, subject to the provisions of this article, for the purpose of

inspecting any motor vehicles and equipment used by such motor carriers in the transportation of passengers and property, and to prohibit the use by any motor carrier of any motor vehicle or parts thereof or equipment thereon adjudged by such agents and inspectors to be unsafe for use in the transportation of passengers and property upon the public highways of this State; and when such agents or inspectors shall discover any motor vehicle of such motor carrier in actual use upon the highways in the transportation of passengers and property to be unsafe or any parts thereof or any equipment thereon to be unsafe, such agents or inspectors may, if they are of the opinion that further use of such vehicle, parts or equipment are imminently dangerous, stop such vehicle and require the operator thereof to discontinue its use and to substitute therefor a safe vehicle, parts or equipment at the earliest possible time and place, having regard for both the convenience and the safety of the passengers and property. When an inspector or agent stops a motor vehicle on the highway, under authority of this section, and the motor vehicle is in operative condition and its further movement is not dangerous to the passengers and property and to the users of the highways, it shall be the duty of the inspector or agent to guide the vehicle to the nearest point of substitution or correction of the defect. Such agents or inspectors shall also have the right to stop any motor vehicle which is being used upon the public highways for the transportation of passengers and property by a motor carrier subject to the provisions of this article and to eject therefrom any driver or operator who shall be operating or be in charge of such motor vehicle while under the influence of intoxicating liquors. It shall be the duty of all inspectors and agents of the Commission to make a written report, upon a form prescribed by the Commission, of inspections of all motor equipment and a copy of each such written report, disclosing defects in such equipment, shall be served promptly upon the motor carrier operating the same, either in person by the inspector or agent or by mail. Such agents and inspectors shall also make and serve a similar written report in cases where a motor vehicle is operated in violation of the laws of this State or of the orders, rules and regulations of the Commission.

(1969, c. 723, s. 2; c. 763; 1973, c. 507, s. 5.)

Editor's Note.—The first 1969 amendment, effective Sept. 15, 1969, substituted "United States Department of Transportation" for "Interstate Commerce Commission" near the middle of subdivision (3).

The second 1969 amendment, effective Sept. 15, 1969, inserted "and property" following "passengers" in six places in subdivision (7).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subdivision (4).

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (3), (4) and (7) are set out.

§ 62-262. Applications and hearings.

(d) Any motor carrier desiring to protest the granting of an application for a certificate or permit, in whole, or in part, may become a party to such proceedings by filing with the Commission, not less than ten (10) days prior to the date fixed for the hearing, unless the time be extended by order of the Commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application, in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file three copies with the Commission, and the protestant shall

certify that a copy of said protest has been delivered or mailed to the applicant or applicant's attorney. When no protest is filed with the Commission within the time herein limited, or as extended by order of the Commission, the Commission may proceed to hear the application and make the necessary findings of fact and issue or decline to issue the certificate or permit applied for without further notice. Persons other than motor carriers shall have the right to appear before the Commission and give evidence in favor of or against the granting of any application and with permission of the Commission may be accorded the right to examine and cross-examine witnesses.

(1965, c. 214.)

Editor's Note. — The 1965 amendment substituted "protestant" for "applicant" preceding "shall certify" in the third sentence of subsection (d).

As only subsection (d) was affected by the amendment, the rest of the section is not set out.

Requirements for Permit to Operate as Contract Carrier.—In addition to the statutory requirements of § 62-3 and this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

The convenience and necessity, etc.—

The granting of franchise authority for the operation of buses over the highways of this State for the transportation of persons and property for compensation must be predicated upon public convenience and necessity. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

If a new service is necessary, etc.—

The Utilities Commission properly granted an application for a contract carrier permit which would authorize the applicant to transfer bank documents and other commodities between banks in the State, notwithstanding the protest by an existing contract carrier of bank documents that the granting of the application would adversely affect its business, where there were findings, supported by competent and substantial evidence, that banks needed the services offered by the applicant and that their need could not be met by any existing means of transportation. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Burden Is on Applicant to Show Public Convenience and Necessity.—The burden of proof is upon the applicant for franchise authority to show public convenience and necessity. State ex rel. North Carolina

Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

What constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

Test of "Public Need" Does Not Apply to Transfer Proceedings.—The showing of public need which subsection (e)(1) of this section requires of an application for a new authority is not applicable in a transfer proceeding under § 62-111 and was not written into it by § 62-111(a). State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The criteria "if justified by the public convenience and necessity" in subsection (a) of § 62-111 is interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in subsection (e)(1) of this section. Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity were shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Subsection (e) of § 62-111 does not indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "pub-

lic convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need in subsection (e)(1) of this section. *State ex rel. Utilities Comm'n v. Associated Petroleum Carriers*, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The factors denominated as imponderables, to wit: Whether the existing carriers can reasonably meet the need for the service and whether the granting of the application would endanger or impair the operations of existing carriers contrary to the public interest, are not solely determinative of the right of the Commission to grant the application. Both are directed to the question of public convenience and necessity. Nevertheless, if the proposed operation under the certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued. *State ex rel. Utilities Comm'n v. Queen City Coach Co.*, 4 N.C. App. 116, 166 S.E.2d 441 (1969).

This section does not purport, etc. —

There is no public policy condemning competition as such, between contract carriers, in the field of public utilities; the public policy only condemns unfair or destructive competition. *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E.2d 814 (1970); *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Granting of Application Not Prohibited by Fact That Competing Carrier's Business Would Be Adversely Affected.—The fact that the granting of a proposed application would adversely affect the business of a carrier corporation, is not a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E.2d 814 (1970).

§ 62-266. Interstate carriers. — (a) This Article shall apply to persons and vehicles engaged in interstate commerce over the highways of this State, except insofar as the provisions of this Article may be inconsistent with, or shall contravene, the Constitution or laws of the United States, and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority or register their exempt operation and registration of their vehicles operated in the State, and to observe such reasonable rules and regulations as the Commission may deem advisable in the administration of this Article and for the protection of persons and property upon the highways of the State.

(b) The Commission or its authorized representative is authorized to confer

A contention that competition between contract carriers should not be allowed since the granting of a proposed application to a contract carrier would adversely affect the business of another carrier, is not a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 367, 174 S.E.2d 808 (1970).

The Utilities Commission's action in authorizing the granting of the permit to an applicant as a contract carrier does not denominate the competition generated by that action unfair or against the "public interest." *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E.2d 814 (1970); *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Findings of fact by the Commission are conclusive and binding upon the reviewing court when supported by competent, material and substantial evidence in view of the entire record. *State ex rel. Utilities Comm'n v. Petroleum Transp., Inc.*, 2 N.C. App. 566, 163 S.E.2d 526 (1968); *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E.2d 814 (1970); *State ex rel. Utilities Comm'n v. American Courier Corp.*, 8 N.C. App. 367, 174 S.E.2d 808 (1970); *State ex rel. Utilities Comm'n v. Kenan Transport Co.*, 10 N.C. App. 626, 179 S.E.2d 799 (1971).

What Constitutes a Contract Carrier.—

See *State ex rel. Utilities Comm'n v. Petroleum Transp., Inc.*, 2 N.C. App. 566, 163 S.E.2d 526 (1968).

Stated in *State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966); *State ex rel. Utilities Comm'n v. J.D. McCotter, Inc.*, 16 N.C. App. 475, 192 S.E.2d 629 (1972), *aff'd*, 283 N.C. 104, 194 S.E.2d 859 (1973).

with and to hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives, or any other federal or State agency in connection with any matter arising under this Chapter, or under the Federal Motor Carrier Act, or under any other federal law which may directly or indirectly affect the interests of the people of this State or the policy declared by this Chapter or by the Interstate Commerce Act.

(c) Any person operating a common carrier motor vehicle in interstate commerce over the highways of this State without filing with the Utilities Commission a copy of its respective interstate authority and registering each vehicle operated in the State with the Utilities Commission in accordance with rules and regulations of the Utilities Commission shall be subject to a penalty of twenty-five (\$25.00) dollars, which shall be added to the registration fees provided in G.S. 62-300(8) and G.S. 62-300(13), and said penalty shall be collected with said registration fee from any carrier operating on the highways of North Carolina without registering his interstate authority by inspectors and investigators of the Utilities Commission in accordance with rules and regulations duly adopted by the Utilities Commission before said vehicle shall be permitted to operate further upon the highways of North Carolina.

(d) No motor carrier, whether operating as a regulated carrier or exempt for-hire carrier, shall operate or cause to be operated in interstate commerce in this State any vehicle until he has filed evidence of required insurance with the Utilities Commission and has been issued an identification stamp for such vehicle, which stamp must be attached to the approved uniform cab card and carried in the vehicle at all times. The identification stamp herein provided for shall be issued on an annual basis as of January 1st each year and shall be valid through February 1st the next succeeding year. When any person is discovered in this State, operating a vehicle in violation of this section, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle until he shall pay to the Utilities Commission a penalty of twenty-five (\$25.00) dollars. Any person denying his liability for such penalty may pay the same under protest. He may apply to the Utilities Commission for a hearing, and said hearing will be granted before a member of the Commission or a hearing examiner within 30 days after receipt of the request of such a hearing. If after said hearing the Commission determines that the person was not liable for the penalty, the amount collected shall be refunded to him. If after said hearing the Commission determines that the person was liable for said penalty, the person paying the penalty may bring an action in the Superior Court of Wake County against the Utilities Commission for refund of the penalty. No restraining order or injunction shall issue from any court of the State to restrain or enjoin the collection of the penalty or to permit the operation of said vehicle without payment of the penalty prescribed herein. (1947, c. 1008, s. 35; 1949, c. 1132, s. 32; 1963, c. 1165, s. 1; 1969, c. 645; c. 721, s. 1; 1971, c. 736, s. 3.)

Editor's Note.—The first 1969 amendment added subsections (c) and (d).

The second 1969 amendment, effective Sept. 15, 1969, inserted "or register their exempt operation" in subsection (a).

The 1971 amendment, effective Oct. 15, 1971, inserted, near the beginning of the first sentence of subsection (d), "whether operating as a regulated carrier or exempt for-hire carrier."

§ 62-268. Security for protection of public.

Applied in *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Cited in *American Nat'l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963).

§ 62-274. Evidence; joinder of surety.

This Is Only Section as to Suit against Liability Insurer by Injured Person. — No

North Carolina statute other than this section authorizes or prohibits a suit against a

liability insurer alone or jointly with its insured by a person allegedly injured by the negligence of the insured. *Jones v. State*

Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

§ 62-281. Safety regulations applicable to motor carrier vehicles.—The Utilities Commission is hereby authorized to promulgate highway safety rules and regulations for all for-hire motor carrier vehicles engaged in interstate commerce and intrastate commerce over the highways of North Carolina, whether common carriers, contract carriers or exempt carriers. (1969, c. 722, s. 1; 1971, c. 586.)

Editor's Note. — Session Laws 1969, c. 722, s. 3, makes the act effective Sept. 15, 1969.

The 1971 amendment, effective Jan. 1, 1972, substituted "all for-hire motor car-

rier vehicles" for "common carrier motor vehicles," inserted "and intrastate commerce" and added "whether common carriers, contract carriers or exempt carriers."

ARTICLE 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment. — (a) The Commission shall receive and collect the following fees and charges, and no others:

- (1) Twenty-five dollars (\$25.00) with each notice of appeal to the Court of Appeals, and with each notice of application for a writ of certiorari.
- (2) Twenty-five dollars (\$25.00) with each application for a certificate or permit for motor carrier operating rights, and with each application to amend such certificate or permit so as to extend or enlarge the scope of operations thereunder, or as filing fee for each broker who applies for a brokerage license under the provisions of this Chapter.
- (3) Twenty-five dollars (\$25.00) with each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations.
- (4) Twenty-five dollars (\$25.00) with each application for discontinuance of train service, or for a change in or discontinuance of station facilities and with each application by a motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.
- (5) Twenty-five dollars (\$25.00) with each application for a certificate of public convenience and necessity, or for any amendment thereto so as to extend or enlarge the scope of operations thereunder.
- (6) Twenty-five dollars (\$25.00) with each application for approval of the issuance of securities, or for approval of any sale, lease, hypothecation, lien, or other transfer of any property or operating rights of any carrier or public utility over which the Commission has jurisdiction.
- (7) Ten dollars (\$10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service from a public utility.
- (8) One dollar (\$1.00) for the registration with the Commission of each motor vehicle to be put in operation by a motor carrier operating un-

der the jurisdiction of the Commission, and a fee of twenty-five cents (25¢) for the annual reregistration of each such motor vehicle.

- (9) Thirty cents (30¢) for each page (8½ x 11 inches) of transcript of testimony, but not less than five dollars (\$5.00) for any such transcript.
- (10) Fifteen cents (15¢) for each 100 words of copies of papers, orders, certificates or other records, but not less than one dollar (\$1.00) for any such record, plus one dollar (\$1.00) for certifying any such paper, order or record.
- (11) Twenty cents (20¢) for each page reproduced by photostatic or similar process and for each page of an order which can be made available without the necessity of copying or reproduction.
- (12) Twenty-five dollars (\$25.00) for the filing with the Commission of the interstate motor carrier operating authority or for registration of interstate exempt operation of every motor carrier operating into, from, within, or through North Carolina and filed with the Commission under the provisions of G.S. 62-266, and five dollars (\$5.00) for filing all subsequent amendments thereto to maintain said filing in a current status.
- (13) One dollar (\$1.00) for the registration with the Commission of each motor vehicle operated into, from, within or through North Carolina by interstate carriers and registered with the Commission under the provisions of G.S. 62-266, and a fee of twenty-five cents (25¢) for the annual reregistration of each such motor vehicle.

(1967, c. 1039; c. 1190, s. 7; 1969, c. 721, s. 2; 1971, c. 736, s. 2.)

Editor's Note.—The first 1967 amendment, effective Nov. 15, 1967, added subsections (a) (12) and (a) (13).

The second 1967 amendment, effective Oct. 1, 1967, substituted "Court of Appeals" for "superior court" in subsection (a) (1).

The 1969 amendment, effective Sept. 15, 1969, inserted "or for registration of interstate exempt operation" in subdivision (12) of subsection (a).

The 1971 amendment, effective Oct. 15, 1971, substituted "and charges" for "or charges" and added "and for each filing of a tariff which seeks general increases in rates, fares and charges" at the end of the first sentence of subdivision (3) of subsection (a).

As only subsection (a) was affected by the amendments, the rest of the section is not set out.

ARTICLE 15.

Penalties and Actions.

§ 62-316. Disclosure of information by employee of Commission unlawful.—It shall be unlawful for any agent or employees of the Commission knowingly and wilfully to divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this Chapter, except as he may be directed by the Commission or by a court or judge thereof. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1971, c. 736, s. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 15, 1971, substituted "except as he may be directed by the Commission"

for "or as he may be directed by the Commissioner" near the end of the section.

§ 62-319. Riding on train unlawfully; venue.—If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars (\$50.00) or imprisoned not more than thirty (30) days. Any person charged with a violation of this section may be tried in

any county in this State through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C. S., s. 3508; 1963, c. 1165, s. 1.)

Editor's Note.—This section has been set out above to reflect a change in the catchline.

§ 62-326. Furnishing false information to the Commission; withholding information from the Commission.—(a) Every person, firm or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall knowingly or wilfully file or give false information to the Utilities Commission in any report, reply, response, or other statement or document furnished to the Commission shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

(b) Every person, firm, or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall wilfully withhold clearly specified and reasonably obtainable information from the Commission in any report, response, reply or statement filed with the Commission in the performance of the duties of the Commission or who shall fail or refuse to file any report, response, reply or statement required by the Commission in the performance of the duties of the Commission shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1969, c. 765, s. 1.)

Editor's Note. — Session Laws 1969, c. 765, s. 3, makes the act effective Sept. 15, 1969.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

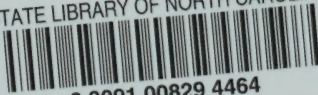
November 1, 1973

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1973 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

ROBERT MORGAN

Attorney General of North Carolina

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